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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 270.

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL., APPELLANTS,

VS.

LAKELAND HIGHLANDS CANNING COMPANY, INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL., APPELLEES.

APPELLEES' BRIEF.

SUTTON & REEVES,
Attorneys for Appellees.

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BRIEF OF APPELLEES.

A. PRELIMINARY STATEMENT.

The statute attacked is known as the Growers Cost Guarantee Law of Florida, relative portions of the same, appearing in the opinion of the three-judge court, from which appeal is taken in this cause and, for the convenience of the court, copy of said opinion is attached hereto in the appendix. A copy of the resolution attacked likewise appears in the appendix.

Unless otherwise noted all italics in this brief are supplied.

B. STATEMENT OF THE CASE.

Appellants' statements of the case and of the statutes and regulations involved are substantially correct and any disagreement we may have with counsel as to the record will be pointed out during the argument in this brief.

C. SUMMARY OF ARGUMENT.

Because of lack of time, appellees were unable to await a copy of the brief from the appellants and, therefore, argument will not be handled in this brief identically with the manner in which appellants have handled theirs, although the same points are covered.

Since appellants in their brief for the first time raise any question whatsoever as to jurisdiction, this point will be treated first.

D. DID THE THREE-JUDGE COURT HAVE JURISDICTION TO GRANT THE TEMPORARY INJUNCTION IN THIS CASE?

This suit was instituted under the provisions of 28 U. S. C. A. 380 and at no time in the proceedings was the jurisdiction challenged by appellants. As a matter of fact, at the hearing on application for preliminary injunction, the appellants urged the court to take jurisdiction and pass upon the constitutionality of the statute involved (R. 76, opinion).

The following elements of jurisdiction affirmatively appear in this case:

(1) The amount involved is in excess of $3,000.00 as to each plaintiff.

(2) A serious federal question is involved.

(3) Necessity for equitable relief.

(1) The Jurisdictional Amount Clearly Appears.

The sworn complaint alleges facts showing that each appellee will suffer damages far in excess of $3,000.00 if the relief prayed for is not granted. When these allegations are contained in a sworn complaint and not challenged by the defendant, there is no duty upon the plaintiff to prove the same, unless, the court of its own motion raises the question.

In *Kvos, Inc.,* v. *Associated Press,* 299 U. S. 269, 81 L. Ed. 183, this court in referring to general allegations in the complaint that there was involved in excess of $3,000.00 said "such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the fact of the complaint, in which case the suit should be dismissed by the court *sua sponte* or upon the defendant's motion." Also see *Gibbs* v. *Buck,* 83 L. Ed. 506, 307 U. S. 66.

It has been frequently held that there is no necessity of proof that the requisite jurisdictional amount is involved, where the necessary amount has been alleged, and there is no plea to the jurisdiction challenging the allegation. See *Lang* v. *Fort,* 76 F. (2d) 27; *So. Dakota C. R. Co.* v. *Chicago, M. & St. P. R. Co.,* 141 Fed. 578.

In *Kroger Grocery & Baking Co.* v. *Lutz, Jr.,* 299 U. S. 300, 81 L. Ed. 251, this court said:

> "In determining whether the requisite jurisdictional amount is in controversy where it does not appear that the complainant is deprived of its license or is prevented by the regulation from prosecuting its business, the question is not the value or net worth of the business but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed." Also see *Gibbs* v. *Buck, supra.*

The question was very thoroughly discussed by Mr. Chief Justice Hughes in *Paul V. McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135, in which case the issue of jurisdictional amount was raised by an answer. In that case it was said:

> "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed * * * They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve."

In our case, as will be pointed out hereafter, the complaint alleges facts showing that the curtailment of the business of the appellees and the consequent loss, if the statute is enforced, would far exceed the sum of $3,000.00 to each of the appellees and the proof amply supports these allegations.

The complaint shows that each of the appellees is engaged in the canning of citrus products produced and grown in the State of Florida; that for the past several years, the canning industry has grown very rapidly and that during the 1937-1938 season, there were canned approximately seven million cases of grapefruit, grapefruit juice and combination juices; that the industry is an important and valuable outlet for citrus fruit, for grapefruit particularly, and that the canning industry has been utilizing from twenty-five to forty per cent of all grapefruit grown in the State of Florida (R. 3-4). The complaint then shows the average annual pack of each of the appellees, alleges that the appellees represent in excess of sixty per cent of the canning industry in volume; that the 1938-1939 season was estimated to be the largest season in the history of the state but, because of the state statute and the regulation attacked herein, up until the time of filing of the complaint there were approximately two million (2,000,000) cases less canned as

compared with the same period during the season of 1936-1937, which was the largest season up until the 1938-1939 season; that the appellees were all canning unusually large volumes up until the statute and regulation went into effect (R. 4); that large volumes of grapefruit were being offered by the growers to the appellees, at prices below the price set by the citrus commission under the act and that, except for the fixed price under the statute and regulation, the appellees could have continued to purchase and can said fruit and each would have made profits far in excess of $3,000.00 (R. 5); that many canning plants in Florida are owned by growers or by co-operative associations, consisting of individual growers; that the commissioner of agriculture has construed the statute *not* to apply to such canners; that the said grower-owned and co-operative canning plants were purchasing their supplies of grapefruit at prices far less than the fixed price of 32 cents and were, therefore, able to offer the canned product at a price so low that the appellees could not pay the growers the 32 cents per box and compete with the co-operative and grower-owned canneries and that, therefore, appellees would suffer damages far in excess of $3,000.00, if the statute was enforced (R. 5).

The complaint further shows that in excess of ninety-nine per cent of all canned grapefruit products canned by the appellees are canned solely for and go into interstate commerce and is sold throughout the United States and foreign countries (R. 5 and 6), that the canned citrus products consumed in the State of Florida are negligible (R. 6), that the canning season opens about the first of November, usually runs for a period of six or seven months and that the appellees in preparing for the canning season were forced to order their supplies, including cans, labels, and other material, and it was necessary that they make contracts for the purchase of part of their fruit requirements, that they secure labor and plan their factory operations, also properly finance

their pack and secure sales orders for part of their finished products; that the enforcement of the statute and regulation would make it impossible for the appellees to so conduct their business, and that each of them would suffer damages far in excess of $3,000.00 (R. 6); that other citrus-producing areas in other states or possessions were not affected by the Growers Cost Guarantee Law and that the strong competition from these other producing areas, where the fruit could be purchased at its market value at that time 12 cents to 20 cents per box rather than at an inflated price, would cause each of the appellees irreparable damage far in excess of $3,000.00 (R. 7).

The complaint shows that each of the appellees has invested in canning factories, stations and equipment in excess of $100,000.00; the total investment of the appellees exceeding the sum of $2,000,000.00 and that the appellees daily employ approximately 5,000 persons and their pay roll amounts to approximately $100,000.00 per week, and that the enforcement of the act and regulation would have serious effect on the value of their investments and each of the appellees would suffer damages far in excess of $3,000.00 (R. 8).

Although the canning of citrus is seasonal, the complaint further shows that when the plants of the appellees are not in operation, it is still necessary to maintain the same and keep on the pay roll many employees and that the appellees suffer large expenses and costs in overhead expenses, salaries; administrative expenses, factory personnel, power and taxes; while not in actual operations; that enforcement of the statute and regulation would make it impossible for appellees to operate their plants and, by reason of the foregoing fact, each of them would suffer loss and damages far in excess of $3,000.00 (R. 9); that each of the appellees would suffer loss in excess of $400.00 per week in pay roll alone while not operating and that if the act and regulation are en-

forced, they will be unable to operate during the remainder of the season and each of the appellees would suffer loss in pay rolls along in excess of $4,500.00 (R. 9).

It is further shown in the complaint that the appellees have, over a period of years, built up a good will for their several labels and products, throughout the United States and foreign countries; that the enforcement of the statute and regulation would cause the appellees to shut down their operations and their good will would be lost and other competing products would take the place of their canned citrus (R. 9); that each appellee would suffer irreparable damage and loss to its trade, good will, and trademarks far in excess of $3,000.00 (R. 10); that the appellant commissioner of agriculture was threatening to revoke the licenses of each of the appellees if they did not comply with said statute and regulation and that the revocation of their licenses would cause irreparable damage to each of the appellees far in excess of $3,000.00 (R. 10).

The foregoing allegations of fact contained in the sworn complaint were substantiated at the hearing by the testimony of C. E. Lindsey (R. pp. 50-63), Fred G. Elder (R. pp. 63-67) as well as the affidavit of Ralph Polk, Sr., president of The Polk Company (R. pp. 72-74) and the affidavit of John A. Snively (R. p. 71).

As further specific allegations of the amount involved, as to each appellee, complaint alleges ~~that~~ and the proof shows that one of the appellees, prior to the promulgation of the regulation, had entered into binding contracts with growers of grapefruit to purchase approximately 60,000 field boxes at a price less than 32 cents per field box and that said appellee had, likewise, contracts of sale to sell the finished product at a price that would have netted the said appellee a profit far ~~less~~ in excess of $3,000.00 (R. 16-64).

Appellants in their brief, for the first time, attempt to raise the question as to whether jurisdictional amount

appears. There was no challenge of this in the lower court. In an effort to sustain their contentions that jurisdictional amount did not appear, they picked from the testimony of the two witnesses certain isolated statements which, considered apart from the rest of the testimony, might not be clear to this court and we, therefore, urge this court to carefully read the entire testimony.

As an example, appellants refer to a portion in the testimony of Mr. Lindsey wherein he stated he had orders somewhere between one hundred thousand (100,000) and two hundred thousand (200,000) cases of canned grapefruit at a contract price which would have caused the company to suffer loss in excess of three thousand dollars ($3,000.00), if he had been required to pay the grower 32 cents a box on the tree for the raw product and he later stated that upon request his company had been relieved of the obligation under the contract, that since the temporary restraining order had been enforced, his company had gained back most of those customers. It is very clear from the testimony of this plaintiff, with orders for between one hundred thousand and two hundred thousand cases of grapefruit that when the act went into effect he had but two courses open; one, to attempt to get out of the contracts or (2) fulfill them and comply with the law which would have caused losses far in excess of $3,000.00. Fortunately, this particular plaintiff was able to get relieved from these contracts. His profits on these contracts would have far exceeded three thousand dollars ($3,000.00) but as a direct result of this statute, he was unable to carry out his contracts and, therefore, was unable to make his profits which would have exceeded three thousand dollars ($3,000.00) (R. 53).

Mr. Lindsey further stated that under the market conditions and confronted with the competition of those who were not subject to the act, his company could not

operate and that when it was not in operation, he had a dead expense of at least five hundred dollars ($500.00) a week, which item alone would run three thousand to four thousand dollars through the season.

As another example, appellants pick out a portion of the testimony of witness, Fred Elder, wherein he admits that in a desperate effort to keep his plant operating, he had submitted to the commissioner of agriculture, for his approval, a contract which would provide for an immediate cash payment of 20 cents on the box to the grower and another twelve cents on January 15th, if the law was enforced at that time. But appellants failed to show to the court that the witness had another condition in the contract and that was that the additional twelve cents would be paid if all the growers continued to get 32 cents throughout the season (R. 65). In other words, if the market price held it up to that basis through the season, then he would see that his growers received that amount (R. 65). This was almost the same setup as with the co-operatives to which the act was not applied (R. 71, 73).

Appellants make much about the statement of Mr. Elder that the purchasers under their contracts for the finished product had agreed to advance their contract price so that he could pay 32 cents per box under the conditions above set forth but appellants lose sight entirely of the fact that the witness stated definitely that, except for the statute, he could have carried out his contracts and made profits far in excess of three thousand dollars ($3,000.00) (R. 64).

This testimony was only by two of the canner plaintiffs. The sworn complaint alleges that while the appellees are not in actual operation, they have one item of expense alone that runs approximately four hundred dollars a week; that is, pay roll for the employees that they must keep on so as to be ready to operate at a later date and that, if the act is enforced against them,

they will be compelled to cease all operations and each would suffer damages in excess of forty-five hundred dollars ($4500.00) during the one season on the one item of pay roll.

This court has said:

> "The value of that right (referring to the right to do business) may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135.

(2) Grave Federal Questions Were Presented.

There is involved in this suit very serious federal questions—the question whether the state statute and regulation attacked (a) violates the Fourteenth Amendment to the Constitution of the United States by depriving the appellees of their property without due process of law and by denying to the appellees the equal protection of the law; and (b) places an undue burden on interstate commerce in violation of Article I, Section VIII, of the Constitution. To put the proposition in other words, the question involved is whether a state has the power to enact a law providing that the farmers of that state shall and must be paid the cost of production of the agricultural commodities grown in that state; when said price-fixing law fails to take into consideration the interest of the public, when the price fixing is based solely, entirely and exclusively on the alleged cost of production, failing to take into consideration the value of the product to the public or its comparative value with other commodities or the ability of the public to pay such a price or any other conditions whatsoever; said statute providing for the fixing of the price by a board without any right of hearing or appeal therefrom; and said statute failing to attempt to regulate the industry in any manner or form whatsoever.

Another very serious constitutional objection to the statute which raises a federal question is the fact that the provisions of the statute may be invoked at any time capriciously, without any warning, and at the will of small groups making it impossible for the appellees to orderly carry on their businesses and to foresee what contracts made by them would be impaired or not impaired by the statute and does not except then existing contracts.

The question involved is indeed a grave question, and if the State of Florida can fix the sales price by the grower or farmer at his cost of production, then it naturally follows that every state in the Union can and should protect its growers and farmers in a similar manner which would create economic chaos throughout the United States.

(3) The Complaint Shows Grounds for Equitable Jurisdiction.

The foregoing statements of fact clearly show the need for equitable relief by the appellees. It cannot be urged that the appellees have any full, adequate and complete relief at law. They must look to equity.

As alleged in the complaint, the canning season in Florida begins about the first of November each year, reaches volume production in some two weeks and continues until June or July of the following year. The statute, under attack, was put into effect by the Florida Citrus Commission in January 20, 1939, as shown by copy of the resolution attached to the complaint as Exhibit "C" (R. 31). Appellees at that time were in volume production. Realizing they could not pay 32 cents per box, the appellees then attempted to carry on their businesses by a practice known as "custom canning" whereby the canners would can the citrus products for the account of the growers and charge a reasonable compensation for the canning. However, the Supreme Court

of Florida on March 17, 1939, held that such procedure was in violation of the Growers Cost Guarantee Law (*Mayo* v. *Eckerson*, 188 So. 781), and the appellant commissioner of agriculture threatened to immediately revoke appellees' licenses. Thereupon, it was necessary that the appellees close their plants until they could get the protection of an injunction and the complaint was prepared and filed within six (6) days thereafter, to-wit: March 23, 1939.

During the confusion, immediately following the passage of the resolution by the citrus commission which put the law into effect and during the time when the appellees were attempting to carry on their businesses even on a different basis, the actual canning industry was greatly curtailed and there were more than two million cases less canned during that period as compared with the period of 1936-1937 which was a comparable year because of large volume.

Therefore, the court will see that the record clearly shows the urgent need of equitable relief at the time the complaint was filed.

This court in the case of *Terrace* v. *Thompson*, reported in 263 U. S., page 197, 68 L. Ed. 255, text 274, held:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case *a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity.* *Cavanaugh* v. *Looney*, 248 U. S. 453, 456, 63 L. Ed. 354, 357, 38 Sup. Ct. Rep. 142; *Truax* v. *Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 134 L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann.

Cas. 1917B, 283. See also *Ex parte Young*, 209 U. S. 123, 155, 162, 52 L. Ed. 714, 727, 730, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Adams* v. *Tanner*, 244 U. S. 590, 592, 61 L. Ed. 1336, 1341, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 506, 61 L. Ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88; *Home Telep. & Teleg. Co.* v. *Los Angeles*, 227 U. S. 278, 293, 57 L. Ed. 510, 517, 33 Sup. Ct. Rep. 312; *Philadelphia Co.* v. *Stinson*, 223 U. S. 605, 621, 56 L. Ed. 570, 577, 32 Sup. Ct. Rep. 340; *Western U. Teleg. Co.* v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430, 30 Sup. Ct. Rep. 286; *Dobbins* v. *Los Angeles*, 195 U. S. 22, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; *Davis & F. Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498."

E. SINCE FEDERAL QUESTIONS ARE INVOLVED THE COURT HAS JURISDICTION AND MAY DECIDE OTHER QUESTIONS PRESENTED.

It has been shown that the jurisdictional amount appeared and that there were substantial federal questions involved before the three-judge court, therefore, the court acquired jurisdiction and it may decide all questions involved even though its opinion is not based upon the constitutionality of the statute. See *Fisher* v. *Brubaker*, 41 F. (2d) 774; *L. & N.* v. *Garrett*, 58 L. Ed. 229, 231 U. S. 298; *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375; *Rice & Adams* v. *Lathrop*, 278 U. S. 509, 73 L. Ed. 480.

Since there are federal questions involved, the court has equity jurisdiction to restrain the appellant from attempting to enforce the statute under attack and to revoke the licenses of these appellees on the following grounds:

(a) The defendant has no legal authority, under law, to revoke the licenses of the appellees because of their violation of the Growers Cost Guarantee Law.

(b) The Florida Citrus Commission failed to comply with the provisions of the statute before fixing the price in that it did not "procure from the producers, shippers, or handlers of all citrus fruit not subject to the provisions of this act binding agreements to conform to and abide by its terms."

(c) That statute is so vague, indefinite and ambiguous that it is unintelligible and unenforceable.

The foregoing grounds will be argued at their proper places in this brief.

F. ARGUMENT.

I. The Only Question Presented by the Record upon This Appeal Is Whether the Three-Judge Court Abused Its Discretion in Granting the Interlocutory Injunction until the Case Could Be Heard upon the Merits.

The appeal now before this court is from the order granting the interlocutory injunction. This statement is emphasized because of its importance to the court at this stage of the case.

A reference to the record clearly shows the court what happened. On March 23, 1939, the complaint was filed. This was six days after the Supreme Court of Florida had ruled that the practice of custom canning heretofore referred to violated the statute. The defendant, commissioner of agriculture, threatened to immediately revoke the licenses of all appellees unless they paid 32 cents a box on the tree to the grower. This is not denied by appellants.

On the same day, to-wit: March 23, 1939, the district judge issued a restraining order conditioned upon the filing of a bond in the amount of five thousand dollars

($5,000.00) (R. 33). As soon as the three-judge court could be convened, a date was set for the hearing upon application for temporary injunction. On April 1, 1939, the respondent, as well as the governor and attorney general, were given notice that application would be made to the three-judge court on April 10, 1939 (R. 33). The Hon. Leon McCord, United States Circuit Judge, called to his assistance Hon. Robert T. Ervin and Hon. Alexander Akerman "for the hearing and determination of the application for temporary injunction" (R. 35). On April 10, the hearing was had, affidavits were filed, two witnesses were examined and the court allowed further time for the filing of more affidavits.

On April 28th, the court entered an order stating that the complaint came on for hearing upon motion for interlocutory injunction and the motion was granted (R. 75). The order of the court in no way attempts to dispose of the merits of the case. The court then filed its opinion on May 3 giving its reasons for granting the motion for interlocutory injunction. In substance, the court said that it appeared to it that the appellees would suffer irreparable damage unless the injunction was issued and the court, therefore, concluded that the injunction should be granted.

~~The opinion consisted of findings of fact and conclusions of law which were a sufficient compliance with the rules.~~

When the opinion was later filed, it consisted of findings of fact and conclusions of law which was a sufficient compliance with the rule. *Sparks* v. *Millwood Dairy*, 74 F. (2d) 695; *National Reserve Ins. Co.* v. *Scudder*, 71 F. (2d) 885; *Lewys* v. *O'Neill*, 49 F. (2d) 603; *Plant Products Co.* v. *Chas. H. Chemical Co.*, 16 Fed. Supp. 553; *U. S.* v. *McIntosh*, 3 Fed. Supp. 715, Cert. Den. 293 U. S. 586.

The case has not been finally disposed of but appellants complain that the action of the court was in error

under the rule laid down in the case of *Polk Co.* v. *Glover*, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 78, wherein it was held that the determination of the constitutional question required a hearing in due course upon the issues raised by the pleadings, which was the same ruling announced in the *Borden's Company* v. *Baldwin*, 293 U. S. 194, 79 L. Ed. 281. But in the Polk case, on a motion to dismiss, the three-judge court received affidavits in evidence and entered a final decree dismissing the bill on these affidavits. Our case is different because the court did not enter a final decree. Appellees, of course, believe and hope that the court on final hearing will be of the same opinion as it was at the time of the hearing of the application for interlocutory injunction but if appellants have any testimony that would show a different state of facts, they have ample opportunity to present the same. The answer was filed by the appellants approximately thirty days after the appeal and it is therefore not before this court on this appeal.

The fact that the district court in its opinion stated that it held the act unconstitutional was brought about by the urgent request of the appellants that the court immediately determine the constitutionality of the act. The whole industry was in confusion, the Commissioner of Agriculture of the State of Florida and the Florida Citrus Commission, representing the industry, wanted and requested an immediate decision on the constitutionality of the act. They cannot now complain of the holding of the court.

Appellants are taking a most inconsistent position before this court. First, they point out and urge, as we do, that the hearing had was upon interlocutory injunction. Next, it is contended the court finally determined the cause. To this, we do not agree. Next, appellants contend that the court should have held the act constitutional. Their brief is devoted largely to arguments of the constitutionality of the act. Under the Polk and

Borden cases, it certainly would have been in error for the court to have declared the act constitutional and to have dismissed the suit; therefore, we cannot agree with counsel that the question before this court is the constitutionality of the act. Certainly the lower court could not have found that the statute appeared to be constitutional and, at the same time, grant the injunction. We recognize that one of the important elements controlling the three-judge court's discretion was the seriousness of the constitutional question; how likely it appeared in the court's judgment that the act would eventually be held unconstitutional. For the purposes of temporary relief only, the district court held the act unconstitutional but its opinion on the constitutionality of the act is subject to revision after the full hearing. The duty of this court upon appeal from an order granting or denying an interlocutory injunction has been definitely announced on many occasions. The first announcements of this court were that the granting or dissolving of a temporary injunction rests in the sound discretion of the court and furnishes no ground for an appeal. *Buffington* v. *Harvey*, 95 U. S. 99.

Later in *Meccano* v. *Wannamaker*, 253 U. S. 136, 64 L. Ed. 822, the court said:

> "The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. * * * The informed judgment of the circuit court of appeals, exercised upon a view of all relevant circumstances, is entitled to great weight. And, except for strong reasons, this court will not interfere with its action."

In *Prendergast* v. *N. Y. Telephone Co.*, 262 U. S. 43, 67 L. Ed. 853, Mr. Justice Sanford discussed this proposi-

tion of law. In that case, application for an injunction against an enforcement of rates established by a public service commission was made to the three-judge court upon the ground of the unconstitutionality of the rates. The three-judge court granted the injunction and there was an appeal ~~from~~ to this court wherein the statement of law in the *Meccano Case, supra,* was again stated. The court also said:

> "Especially will the granting of a temporary writ be upheld when the balance of injury as between the parties favors its issue."

Mr. Justice Sutherland, in *Rice & Adams* v. *Lathrop,* 278 U. S. 509, 73 L. Ed. 480, said:

> "An interlocutory injunction, at least ordinarily, is not a matter of strict right; but the application is addressed to the sound discretion of the court. 1 High, Inj., 4th Ed., Secs. 11 and 937. And here the trial court denied the application, not because it would have been error to grant it, but in the exercise of its discretion, principally based upon a balancing of the relative conveniences which might result. This is made clear by the trial judge, who, interpreting his own action, expressly held that the relief sought was grantable but was only denied by the court in the exercise of its discretion. That the case was one for the exercise of discretion is plain. *Id.*, Section 937; *Southwestern Brush Electric Light & P. Co.* v. *Louisiana Electric Light Co.,* (C. C.) 45 Fed. 893, 895, 896; *Whitcomb* v. *Girard Coal Co.,* (C. C.) 47 Fed. 315, 317, 318; *Rousso* v. *Barber,* (C. C. A.) 276 Fed. 552, 553. The order denying the injunction, therefore, was conclusive in an appellate court; and an order granting it would have been equally so. *Buffington* v. *Harvey,* 95 U. S. 99, 100, 24 L. Ed. 381, 382."

The same rule is announced in *State of Alabama* v. *United States,* 279 U. S. 229, 73 L. Ed. 675, where the Meccano case is again cited and followed.

An often-cited case on this point is *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, Circuit Court of Appeals, Eighth Circuit, Mr. Justice Sanborn delivered the opinion of the court and after pointing out that application for interlocutory injunction is addressed to the discretion of the trial court, not to that of the appellate court, stated that the only question involved on the appeal is "*Does the proof clearly establish abuse of that discretion?*" The court also said:

> "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable or probably may be indemnified by a bond, the injunction usually should be granted."

The three-judge court in our case was no doubt influenced by the rule announced by Mr. Justice Sanborn to the effect that if the injury to the moving party will be great, certain and irreparable, if the injunction is denied and final decision is in his favor, while, if the decision is otherwise, and the injunction is granted, the inconvenience and loss to opposing party will be inconsiderable. Of course, there was no inconvenience or loss whatsoever that could be sustained by the appellants in this case. From a practical standpoint, as found by the three-judge court, there would be no loss even to the grower of citrus fruit in Florida if the injunction be granted. Because of the statute involved, his fruit was

falling from the trees and rotting in the groves and the grower could not recoup any part of his cost of production. By the granting of the injunction, the law of supply and demand could at least help him to some extent.

This court in *Ohio Oil Company* v. *Conway*, 279 U. S. 813, 73 L. Ed. 972, approved the rule announced in the *Love Case, supra*. There are numerous other authorities along the same line with *Munoz* v. *Porto Rico*, 83 F. (2d) 262, as a good example.

From a study of the decisions of this court, we find that it generally disposes of appeals from interlocutory injunctions by affirming upon the authority of cases holding that the matter rests in the sound discretion of the trial court. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 120, 79 L. Ed. 1032; *Langer* v. *Grandin Farmers Cooperative Elevator Co.*, 292 U. S. 605, 54 S. Ct. 772, 78 L. Ed. 1467; *Northwest Bancorporation* v. *Benson*, 292 U. S. 606, 54 S. Ct. 775, 78 L. Ed. 1468; *South Carolina Power Co.* v. *South Carolina Commission et al.*, 286 U. S. 525, 52 S. Ct. 494, 76 L. Ed. 1268; *Ogden & Moffett Co.* v. *Michigan Public Utilities Commission*, 286 U. S. 525, 52 S. Ct. 495, 76 L. Ed. 1268; *United Drug Co.* v. *Washburn*, 284 U. S. 593, 52 S. Ct. 202, 76 L. Ed. 511.

Appellants do not, in their brief, seriously contend that the three-judge court abused its discretion in granting the injunction. As we understand their contentions they consist of criticism of the manner in which the three-judge court conducted the hearing and that the findings of the court were not supported by the facts.

In the first place, we know of no rule of law that binds the hands of the trial court to rigid rules on application for temporary injunction.

It is, of course, customary on applications for injunctions to use affidavits of evidence; however, there is nothing in the rules that prohibits the court from taking additional testimony by way of sworn witnesses. This case was of vital importance to the appellees and repre-

sentatives of two of the plaintiffs were produced, each of whom had been in the canning business in the State of Florida for many years and who were capable of lending assistance to the court in arriving at the facts. They were submitted and subjected to cross examination by counsel for appellants. Certainly, there can be no justified criticism of the court because it heard two witnesses.

To the surprise of the appellees, appellants, after the argument, produced the affidavit of one J. F. Mays (R. 68), and thereupon appellees requested time to file rebuttal affidavits to the Mays affidavit. Mays says in effect that the law was fairly and uniformly enforced against all canners. To refute this, a certified copy of the resolution of the Florida Citrus Commission was thereafter filed by the appellees on April 15, wherein the Florida Citrus Commission recognized that the law had not been enforced against all handlers, pointing out in the resolution that the auction sales of grapefruit showed that the producer was not receiving his cost of production and "it is generally felt that all the canners are not paying the cost of production" (we later show that the co-operative canners and grower-owned canneries were not), and, then, the citrus commission by its resolution calls upon the commissioner of agriculture to enforce the law upon all handlers, shippers, and canners alike or, if in his opinion there was any reason why the law should not be enforced, to then inform the commission. This resolution was unanimously adopted on March 21, 1939, by the Florida Citrus Commission (R. 69, 70).

The affidavit of John A. Snively, filed by appellees on April 15, states that Polk Packing Association, a co-operative canning association of which the affiant was president, had canned for its grower members between January 19 and March 23, 1939, between sixty thousand (60,000) and seventy thousand (70,000) cases of grapefruit and that the association was unable to sell the fin-

ished product at a price that would yield the grower members 32 cents a box on the tree, that finally, after other co-operative associations and grower-owned canning companies had quoted the finished product at a lower price, the said Polk Company sold approximately fifty thousand (50,000) cases of said grapefruit juice at a price which would yield the grower a price less than 32 cents a box on the tree (R. 71).

Affiant further said that if the law was enforced against his association, the association would have to take the loss in its operation and that, therefore, each grower member would have to suffer his proportionate part of the loss and that he would not therefore receive his 32 cents a box (R. 72).

Affidavit of Ralph Polk, Sr., president of The Polk Company, one of the plaintiffs and a canner who had been in the business in the State of Florida for over eighteen (18) years, refutes the statements in the affidavit of Mays (R. 72). Mr. Mays made the statement that canning plants had operated and paid 32 cents and made a profit but Mr. Polk shows clearly that it was impossible for any canning plant to tell what profit it had made until the season had been completed and the finished product sold and disposed of (R. 73). Affiant further stated that he knew of his own knowledge that many growers had delivered their fruit to the co-operative associations and received returns far less than 32 cents a box, that he knew there were large volumes of the canned product which had been canned by the co-operatives and that they had not paid the grower 32 cents a box and that these canned products were being offered in competition with the products of the plaintiffs (R. 73). Affiant further stated that since the law became effective, it had been necessary for his company to cease operations and in order to meet the requirements to buyers, it had been forced to purchase large volumes of canned grapefruit from co-operative and grower-owned canning

plants at prices insufficient to return to the grower the cost of production as fixed by the citrus commission and that he knew the canned products he had purchased had been canned after the act went into effect and before the temporary injunction was issued.

The foregoing, to our mind, was clear and convincing evidence showing to the court the need for immediate injunctive relief and we see nothing "unusual, undignified and cumbersome" as claimed by appellants.

Appellants seem to make much of the fact that the opinion of the three-judge court was dated April 13, 1939, although additional affidavits were not filed until April 15. In the first place, the opinion was not rendered until May 3, 1939, which was long after the affidavits had been filed. Of course, we do not know what happened but we might surmise that the evidence which it had already heard had been sufficient and it wrote the opinion but held the same up until the other affidavits were filed. Certainly, such an irregularity, if it may be called that, would not justify this court in reversing the lower court.

Appellants devote many pages of their brief to attempts to show this court the findings of fact by the three-judge court were not supported by the record. It is simply unnecessary to burden this court with what would necessarily have to be a long, detailed analysis of the record to refute the contentions of the appellants. The three-judge court was interested to know whether the facts would warrant the issuance of a temporary injunction. The statute appeared to the three-judge court to be unconstitutional and the facts showed irreparable loss and damage to the appellees unless the injunction was issued.

There was only one point in the case where there was any contradiction in the evidence and that was as to whether the commissioner of agriculture did, in the interpretation of the act and the enforcement thereof,

discriminate against the plaintiffs. We have already referred to the evidence on this question and the lower court made a finding on it and certainly there is no showing nor can there be any showing from the record that the court was clearly wrong in making this finding.

Appellants find fault with the statement in the opinion of the three-judge court that the industry is dependent upon the canners as much as upon the growers and for several pages points out to this court the primary importance of the growers. Of course; the industry cannot survive without the grower, neither can the industry survive without the opportunity to can approximately one-half of the volume so that it may be preserved and used by the public throughout the year. Appellants state that this act is for the protection of the grower. Surely, that is what the legislature had in mind but it cannot do this to the detriment of a material part of the industry and to the public generally.

We would be living in the often referred to "Utopia" if the legislative branch of the government could guarantee to all people a profit in their line of endeavor. There is not one of the appellees that would not be glad to see the grower make a profit in his occupation.

Appellants say that the industry will die if the growers are not taken care of. Canning will die, too, if it is to be throttled by such legislation. It is unfortunate if the grower is unable to get his cost of production in one year when there happens to be a surplus, but there is no law that makes him keep in that business. He can go into some other line of endeavor. If the canner cannot make a living in the canning business, he can go into another line of endeavor. Suffice it to say that if the legislature by such legislation can insure to the canning industry that it would never take a loss even when the market are "flooded" then business men would all want to get into the canning business and, as a result thereof, there would be an overproduction of

canned products and finally the entire industry would fall of its own load.

II. The Statute and Regulation Deprive the Appellees of Their Property Without Due Process and Deny to the Appellees Equal Protection of the Laws in Contravention of the Fourteenth Amendment.

The objections under the fourteenth amendment to the statute and regulation rest upon three propositions: (a) the statute and regulation are unreasonable, arbitrary and capricious; (b) the statute and regulation are discriminatory in that the effect of the same is to discriminate against the appellees, who may be referred to as independent canners, and in favor of co-operative and grower-owned canners, who are in the identical line of business and are actual competitors; and (c) the statute does not provide for a full hearing before determining the cost of production and no hearing was had by the commission.

Under these two subjects will be discussed the right of a legislature to regulate business generally, what businesses are affected with a public interest, the reasonableness of the statute, equal protection of the laws, necessity for a hearing after notice and other kindred points.

(a) The Growers Cost Guarantee Law and Regulation Passed Thereunder Are Unreasonable, Arbitrary and Capricious and Deprive Appellees of Their Property Without Due Process of Law.

It is realized that cases involving the field within which the police powers of a state may be appropriately exercised without undue encroachment upon fundamental, personal and property rights granted by the Federal Constitution usually present difficult questions for the judicial branch of the government to decide but they are questions which, under our form of government, must be decided otherwise constitutional guaranties would become "mere scraps of paper."

However, at the outset, may we say that, after diligent search, we were unable to find where any legislature has passed any act similar to the one under attack. Usually regulatory legislation takes into consideration morals, health, or public welfare and most cases deal only with services or labor. We find where certain businesses have been regulated because of necessary sanitation problems, others because of monopoly. Here, we have a statute directed to one portion of an industry, to-wit: the growers and attempting to fix the price of a commodity. The court knows that citrus fruit is subject to rot and decay but that the same may be preserved in cans for long periods of time. True, citrus fruit is not subject to contamination and spoilation such as milk, which cannot be preserved in its fresh state for long periods of time. The Florida legislature in fixing the price of grapefruit did not give any consideration whatsoever to other phases of the industry, to those who are canning approximately one-half of the grown citrus, to the thousands working in canning plants, to those who are packing and shipping, to those who are distributing and, finally and most important, to those who consume it.

The statute under consideration does not take into consideration the value of the commodity, nor of the ability of the purchaser to pay a fixed price but only attempts to protect the grower by saying that each year he must be paid his cost of production. The statute provides that it is only to be effective when the commissioner of agriculture, with the consent and advice of the governor, declares the existence of a state emergency in the citrus industry. In other words, as long as there is no emergency and as long as the grower is making money in his adventure, the statute is ineffective. One year market conditions, may we say if affected by world-war conditions, may be such that the grower will receive (10) ten times his cost of production but if the next year economic conditions are different and the public is unable

to pay his cost of production, the legislature then, under this act, says that he cannot sell his fruit; therefore, the act in effect grants to the grower a profit.

All price-fixing laws, which we have found, are tested by the rule as to whether the public welfare and public interest are so great that they over-balance the personal guaranties and liberties of the Constitution. In the statute under attack, the public is given no consideration whatsoever and the price fixing was not in the interest of the public but only in the interest of one portion of the industry, not even affecting all growers but only those who grow a particular variety of citrus—grapefruit.

In other words, we are dealing with an act by which the state, acting through a board, assumes to exercise the power to fix the price to be paid for a common agricultural commodity. It is not a statute regulating a business or an industry; it is not a statute regulating a public utility, nor a paramount or basic industry, nor one directly or materially affecting the public health, such, for instance, as the dairy industry but it is a statute which attempts to say to the people of the United States and of the world, "you must pay for grapefruit such a price that will enable dealers or canners in Florida to pay to our Florida growers their cost of production."

Whether the fixing by the state of a growers cost price for every commodity in the state would constitute a wise policy, is not for this court to say but this court must decide whether the same can be done for the growers of one variety of a commodity of one state under the Constitution of the United States as it now stands.

Our forefathers, after they had won their independence and liberty at so great a price, probably believed that they had found the answer to all social problems in individual liberty and free competition but they also knew that individual liberty would not permit them to do absolutely as they pleased, regardless of the effect of their

conduct on the general public or on the liberties and rights of other individuals; what they, evidently, had in mind was the attainment of that liberty which would protect the citizens in the enjoyment of life, liberty, and property.

The law is well settled that a legislative declaration that a business is impressed with a public interest and demands regulation under the police power or in the public interest is not conclusive but is a matter which is always open to judicial inquiry.

These concepts must stand or fall on the particular factual background, but in no case should either concept be used as an instrument of abuse or to write into the law group concepts of social justice in total disregard of the rights of the public.

It was held in *State* v. *Ives*, 123 Fla. 401, 167 So. 394:

> "Freedom of contract is the general rule; restraint is the exception and when it is exercised to place limitations upon the right to contract the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances. *Ex parte Messer*, 87 Fla. 92, 99 So. 330."

The Supreme Court of Florida in *Whitaker* v. *Parsons*, 80 Fla. 352, 86 So. 247, stated:

> "The purpose of constitutional government is to secure individual rights subject to valid regulations *enacted in the interest of the public good.*"

The courts, at all times, must remember that in any regulations adopted, the exercise of the police power must be deemed to be fairly necessary to secure some object directly affecting the public welfare. The Fourteenth Amendment prohibits the states from striking down personal rights but the law has recognized the power of the state to curtail personal rights incidentally necessary for the accomplishment of some other paramount object and one that concerns the public welfare.

Although there appear to be certain conflicting announcements by the several courts, involving the rights of the state to limit and regulate personal rights guaranteed by the Constitution, we believe that the foregoing statements of law fairly present the general principles which should, at all times, guide the courts in determining these troublesome questions.

We take it as true that each set of facts involved in each case must be tested by the constitutional requirements and this has, naturally, led to decisions of the many courts, which, at first blush, seem to be conflicting.

In determining whether a business may be regulated by the state, we must first consider the extent to which the public is interested in the business. Not so many years ago, it was thought that only those businesses could be regulated which were "affected with a public interest"; that is, that the individual "had granted to the public an interest in the use of his business." However, those expressions have been further discussed by this court in later cases and the courts have attempted to get away from those expressions.

No particular formula or test has been unanimously agreed upon as final or conclusive but it seems from the studying of the cases, that when a business has been found to be affected with a public interest or, in other words, that the public welfare must be recognized in the business, then the state legislature may make reasonable regulations of its use *for the protection of the public* in its relation to those who carry on such a business.

On the other hand, when a business is actually devoted to public use such as railroads, other common carriers, etc., the states may regulate not only the use of the business but the compensation to be paid for it.

An examination of the cases clearly shows that it is not every business or profession which has been subjected to police regulations that may also be subjected to price fixing. Doctors, lawyers, osteopaths, public accountants, trust companies, hotels, etc., are all regulated

but the mere fact that the legislature has power to regulate professions, trades, etc., does not mean that it has the power to fix the prices.

There must always be a real connection between the provisions of a police regulation and its purpose and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. Even where price fixing has been upheld, it has always been as an incidental part of general regulations of an entire business. In order to regulate the business, it has sometimes been necessary to regulate the prices; but, in the statute under discussion, there is no attempt to regulate the citrus business whatsoever; there are no regulations involved in the statute, only the price-fixing provision. The statute which has no real, substantial or rational relation to the public safety, health, morals, or general welfare, invades the rights secured by the Constitution and cannot be sustained under the police power.

We, of the legal profession, selfishly consider that our profession is affected with public interest to a great extent. We must realize that there are some unfair practices among the members of our profession and, yet, we do not think any court would ever say that the legislature, under police power, could set the minimum fees for the lawyers and thereby cure the avowed evil. That is the situation in the statute under attack. The legislature found "that unfair, unjust, destructive, demoralizing and uneconomic trade practices have and continue to be carried on in this state." Does the fixing of the price to be paid the grower have any real or substantial relation to the object sought to be attained?

If the finding of the legislature is correct, then there are now in existence laws which would prevent the alleged evil.

Before discussing the many announcements of this court, we think it might be of benefit to submit to this court our reasons why the case of *Nebbia* v. *New York*,

291 U. S. 502, 78 L. Ed. 940, is not controlling because appellants at the hearing based all of their contentions on this case. In the first place, the Nebbia case was dealing with the statute regulating the price of a valuable food product produced in all states and of universal consumption throughout the State of New York; milk, one of the prime necessities of life to tens of thousands of people, a necessary article of diet; a product liable to contamination and adulteration. The New York statute was dealing with the entire industry of that state and not just a portion.

In referring to the Nebbia case, Mr. Justice Roberts, in *Borden's Farm Products* v. *Peter G. Ten Eyck*, 297 U. S. 251, 80 L. Ed. 669, recognized that the price fixing provisions had been upheld "in the circumstances existing in the State of New York in 1933" which emphasizes the fact that the peculiar circumstances in the industry prompted the court in upholding the law.

In the *Borden Case, supra,* this Honorable Court upheld the differential in the prices as between milk dealers having a well-advertised trade name and those which did not but pointed out "the prices paid by dealers to producers under the Milk Control Law, have been the same for all dealers no matter how classified." The court very clearly stated "we have no occasion to determine whether the differential would become unlawful, and the appellant would be entitled to relief, if there were proof that in practice it produces such gross inequality, and so unnecessarily damages the appellant, as to shock the conscience."

On that particular point, may we respectfully call the court's attention to the fact presented in the instant case, to-wit, that the gross inequality produced by the statute under attack makes it impossible for the appellees to compete with their competitors. The statute did not provide that grower-owned canneries and co-operative canneries could buy grapefruit at a differential price from

the plaintiffs as independent canners, nor that they could sell their finished product at a differential price. The legislature must have known that there was no reason under the sun to make such differential but the act even went further and said, as interpreted by the commissioner of agriculture, that the grower-owned canneries and co-operative canneries could pay for their raw products whatever price they desired. In other words, they could buy the product at the market price which, as shown by the record, was less than the fixed price and they could can the product and put it on the market at a price which, as shown by the record, was less than the fixed price and would absolutely destroy the businesses of the appellees including their large investments. This should meet the ruling in the Borden's case in that it would "shock the conscience." On this particular point, the statute and the regulation are not only unreasonable, capricious and unfair but discriminatory in the highest degree.

This court in *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 80 L. Ed. 675, struck down the differential provision so far as it attempted to apply to dealers entering the business after a certain date, stating through Mr. Justice Roberts:

> "The appellant had not a well-advertised trade name. The reason for refusing it a license was that though it had not been continuously in the business of dealing in milk since April 10, 1933, it had sold and was selling to stores milk at a price a cent below the established minimum price. The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimination which has no foundation in the circumstances of those engaging in the milk business in New York City, and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the Fourteenth Amendment. The record discloses no reason for the discrimination."

It was further said in that case:

> "This is but another way of saying the legislature determined that during the life of the law no person or corporation might enter the business of a milk dealer in New York City."

This later statement is very appropriate to the act under discussion because our legislature has attempted to say not only that during the life of the law no independent canner could enter the business but it went further and in effect said that during the life of the law, those canners then in the business in the State of Florida would have to go out of business and close their doors. And, while fruit was rotting on the trees, due to the fact that market conditions would not permit payment of 32 cents by the appellees, the grower-owned plants were canning their products costing less than 32 cents.

The court, in the *Mayflower Case, supra*, held that such classification was arbitrary and unreasonable and denied the appellant the equal protection of the law.

Since it has been clearly shown that the facts and circumstances of each case must be thoroughly analyzed by this court before it can determine the validity of an attempt to regulate the same, we say that the Nebbia case is no authority whatsoever for the contention that the Florida Growers Guarantee Law is valid.

A case more nearly in point is *Williams* v. *Standard Oil Company*, 278 U. S. 235, 73 L. Ed. 287, which was a suit involving the Tennessee statute attempting to regulate the price of gasoline. In the opinion of Mr. Justice Sutherland, it is pointed out that a business is not to be regulated merely because it is large or because the public is warranted in having a feeling of concern in respect to its maintenance. In that case, in support of the act, it was urged that gasoline was of wide-spread use; that enormous quantities were sold in the State of Tennessee; that it had become necessary and indispensable in carrying on commercial and other activities within

the state. This court stated that it was concerned with the character of the business not the size or the extent to which the commodity was used and pointed out that gasoline was an ordinary article of trade, differing in no essential respect from other articles commonly bought and sold by merchants. The court also held unconstitutional a provision of the act making it unlawful to grant any rebates, concessions, or gratuities to any purchaser for the purpose of inducing the purchaser to use gasoline of the particular dealer saying that these provisions "are unconstitutional restrictions upon the right of the private dealer to fix his own prices."

In 1927, Mr. Justice Sutherland in *Tyson & Bros. United Theater Ticket Offices, Inc.*, v. *Banton*, 273 U. S. 418, 71 L. Ed. 718, very exhaustively discussed regulatory laws and particularly price-fixing laws. In that case as well as in ours, plaintiff brought a suit to enjoin the respondents from revoking plaintiff's license on alleged threats on the part of the respondents to forfeit the license of the plaintiff. In the complaint in this case, it is alleged that the commissioner of agriculture has threatened to revoke the licenses of each of these appellees if they failed to abide by the statute under attack. In the Tyson case the jurisdiction of the district court was sustained. The court again announced that the right of an owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself and within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments (citing cases). The court said:

> *"The power to regulate property, services, or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all. The authority to regulate the conduct of a business or to require a license comes from a branch of the police power and*

*which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business. * * * The latter power (referring to price fixing) is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."*

We pause in discussion of the Tyson case to again emphatically call to the attention of this court that the statute and regulation under attack in this case do not attempt in any manner to regulate the citrus industry or even the canning industry and the price fixing is not an incident to other regulations but it fixes the price to be paid the grower of an agricultural commodity without any attempt to regulate the industry or any portion of it or without any reference or consideration for the public welfare. This is a novel attempt by the legislature of Florida and finds no precedent in any other statutes.

Referring again to the *Tyson Case, supra,* we feel that the principles announced in the opinion in that case could very properly be quoted in full in this brief in support of the contentions of the appellees, but this court is thoroughly familiar with that case and it has been cited innumerable times to this court and by this court.

Price fixing is commonly directed toward the prevention of exorbitant demands, and the element common to all price-fixing laws is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a large number of the members of the community. Laws regulating prices have been in the interest of the public welfare. Legislatures have attempted to fix maximum

prices or charges so as to protect the public, such as the maximum profit to be made by the handlers of tickets as in the *Tyson Case, supra*, and the maximum charges for handling tobacco or the maximum sales prices of milk or of other essential commodities so that the public may be protected and that people dealing with the sellers may have some protection. But, in our case, we find the very opposite. It is not a maximum law but a minimum law and cannot be for the protection of the public or for a large number of the members of a community. Even if we assume that the large number of the members of the community sought to be protected are the growers, the three-judge court very clearly pointed out that the effect of the law is not to protect even the growers because the grower may have invested $10,000.00 in the cost of production of his crop of grapefruit, that he may be able to sell the same for $8,000.00 at the market price and, therefore, recoup part of his investment but, under the statute, he would be forced to permit the same to fall in the groves and rot thereby suffering a loss of $10,000.00 instead of $2,000.00.

In the *Nebbia Case, supra*, it was stated that

> "the means selected shall have a real and substantial relation to the object sought to be attained."

Applying this test, it is unnecessary to go into any great detail to show that the means selected has no real and substantial relation to the object sought to be attained. As an example, the legislature says that the "present acute, economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities." The means selected to cure this evil is to set a uniform price on citrus fruit at the grove without taking into consideration in any manner or form whatsoever the price of any other commodity. Is it not asking too much when the legislature requests the courts to shut their eyes to

the fact that other commodities do not always bring the cost of production? Will the fixing of a production cost price to the growers of grapefruit alone decrease the disparity between the citrus and other commodities? The court will note that the regulation under attack attempts to fix the cost of grapefruit only and does not even take into consideration the cost of similar commodities, not even oranges.

Again it is stated by the legislature that "it is expedient and necessary to build up the quality of Florida citrus fruit in the market." The means selected is to set a minimum price to be paid to the grower for grapefruit which, of course, kills any incentive for the grower to have any care whatever for the quality of his fruit. Why should he be interested in making soil analysis, making the proper applications of fertilizer, or of irrigation, or of spraying as he knows that he will get a certain price for his fruit regardless of his quality. How can it be said that fixing the cost of production for grapefruit will raise the quality and reputation of other Florida citrus fruit. The means selected has no relation to the object sought to be attained.

In *Fairmont Creamery Company* v. *State of Minnesota*, 274 U. S., page 1, 71 L. Ed. 893, this court held unconstitutional a state statute forbidding creameries to purchase cream at higher prices in one locality than another locality, after allowance for differential in cost of production, on the ground that the same violated the Fourteenth Amendment, also because it had no reasonable relation to the legislative purpose, and referring to numerous cases cited said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment and to declare it invalid when without substantial relation to some evil within the power of

the state to suppress and a clear infringment of private rights."

In *New State Ice Co. v. Liebman*, 285 U. S. 262, 76 L. Ed. 747, the State of Oklahoma had passed an act to regulate the manufacture, selling and distributing of ice which provided, among other things, that no one could go into the business unless it first obtained a license from the state. The New State Ice Company engaged in the business without a license and brought the suit to enjoin enforcement of the act. The court pointed out that all businesses may be subject to some measure of public regulation and said:

"* * * plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 513, 68 L. Ed. 813, 826, 32 A. L. R. 661, 44 S. Ct. 412, and authorities cited; *Louis K. Liggett Co. v. Baldbridge*, 278 U. S. 105, 113, 73 L. Ed. 204, 208, 49 S. Ct. 57.

"Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another

from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed."

In *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. Ed. 913, the court held that a state had power to regulate the business of an employment agency but did not have power to fix charges for services rendered, recognizing the difference between the right to regulate and the right to fix prices and said:

> "* * * *the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power* * * * *to urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation but not for price fixing, as we have already definitely decided.*"

Munn v. *People of Illinois*, 94 U. S. 113, 24 L. Ed. 77, has been cited to this court on so many occasions that we think it unnecessary to fully analyze the principles enunciated therein. Mr. Justice Waite very clearly gave the historical background of the Fourteenth Amendment and when referring to the limitations on personal liberty and use of personal property by police power said:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, *when such regulation becomes necessary for the public good.*"

Is the regulation involved in this suit necessary for the public good? The proven effect of the regulation is

to cause a healthful food product, grapefruit, to lie in the groves and rot, is conducive of poor quality of fruit rather than better quality and deprives the appellees of their right to engage in the canning industry free of arbitrary restraints. When it stops a pay roll of approximately $100,000.00 a week to approximately 5,000 people and practically destroys the investments of the appellees totaling some $2,000,000.00, is the regulation in the interest of the public? When the regulation stops the flow into interstate commerce of millions of cans of health producing fruit, can it be reasonably said that it is for the public good?

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322, text 326, it is warned that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

An often-cited case is *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. Ed. 1103, dealing with the power of the states to pass regulatory laws that do not contravene the Fourteenth Amendment. In that case it was said:

> "It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified."

The court pointed out that regulation of food preparation has never extended to fixing prices to the public, that there is no monopoly in the preparation of foods and that the prices charged are fixed by competition throughout the country at large. It further says "given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not

likely, and the danger from local monopolistic control less than ever." So appropriately can this be applied to the grapefruit industry.

The record shows that grapefruit is now being grown in Texas and other areas in large commercial volumes, as well as in Florida, and an attempt by one state to fix the price to the grower of grapefruit within that state can do no more than to cause chaos in the grapefruit industry. The legislative department cannot increase the value of grapefruit by a fixed price to the producer of Florida grapefruit. This can mean but one thing—that when the competition from Texas and Arizona and other producing areas, backed by a large supply, lowers the value of grapefruit to the public below the cost of production then, under the statute of Florida, the grapefruit in Florida must stay on the trees and rot (R. 7, 50, 51).

If 32 cents is the average cost of producing grapefruit in Florida, then evidently, some grapefruit is produced for less than 32 cents in certain portions of the state, depending upon the soil conditions, etc. Under the law, those producers are guaranteed a profit. It can readily be seen the results of this—more people will go into the business of producing grapefruit until, finally, we will have such an enormous production that the entire industry will have to fall of its own load.

This very situation has happened under voluntary marketing agreements affecting peaches, so we are advised. If this statute is constitutional, the State of Florida will be forced to protect all its other producers of other agricultural commodities by fixing an average cost of production and providing that their products cannot be sold for less with the result of a complete economic breakdown.

The *Old Dearborn* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109, decided only three years ago, the court recognized that the authorities we have heretofore cited hold that the right of the owner of the property to

fix the price at which he will sell it is an inherent attribute of the property itself and within the protection of the Fifth and Fourteenth Amendments. Mr. Justice Sutherland, speaking for the court, said:

> "In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. *Tyson & Bros. United Theater Ticket Offices* v. *Banton*, 273 U. S. 418, 429, 71 L. Ed. 718, 722, 47 S. Ct. 426, 58 A. L. R. 1236; *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 537, 67 L. Ed. 1103, 1109, 43 S. Ct. 630, 27 A. L. R. 1280; *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. Ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 73 L. Ed. 287, 49 S. Ct. 115, 60 A. L. R. 596; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 76 L. Ed. 747, 52 S. Ct. 371. These hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them."

This court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. Ed. 703, held:

> "In forbidding the deprivation of liberty without due process of law, the constitution does not recognize an absolute and uncontrollable liberty, the liberty safeguarded being liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."

In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. Ed. 1014, Mr. Justice Brewer said:

> "It has always been a part of the judicial function to determine whether the act of one party

(whether that party be a single individual, or an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation in whatever form it may be enacted by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

It was also pointed out in that case "that a valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

The Supreme Court of Illinois in *Chicago District Park* v. *Canfield*, 19 N. E. (2d) 376, 121 A. L. R. 557, said:

"The rule recognized in this state is that all uses of property or courses of conduct which are injurious to the health, comfort, safety, morals and welfare of society may be prohibited under the sovereign power of the state, though the exercise of such power results in inconvenience or loss to individuals. The exercise of such power, however, must find basis in the doctrine of overruling necessity or bear some substantial relation to the public good. Laws which impose a penalty upon an individual, or interfere with his personal liberty, cannot be sustained unless they find basis in public health, comfort, safety or welfare. An arbitrary invasion of

the personal rights of an individual citizen under the guise of police regulation is not countenanced. While the General Assembly may first determine when the necessity exists for the exercise of this power, such determination is not final or conclusive. What are the subjects of its exercise is a judicial question."

III. The Statute and Regulation Constitute a Direct, Unconstitutional Interference with Interstate Commerce.

The record shows that, during the past decade, the anning of grapefruit and grapefruit juice with other itrus fruits has developed into one of the principal in-ustries of the State of Florida; that the volume of canned rapefruit and grapefruit juice has continued to increase ntil the year 1937-1938 there were approximately seven illion cases produced in Florida (R. 3); that practi-ally the entire pack (99%) is canned solely for and goes nto interstate commerce, being sold in almost every state f the United States and in foreign countries; that the mount of canned citrus products consumed in the State f Florida is negligible. The appellees purchase grape-ruit in Florida solely for the purpose of interstate com-nerce, process the same by putting it into cans and then hip it into interstate commerce or foreign countries.

Appellant contends that "until such time as a com-nodity actually commences its journey from one state to nother, the state in which the commodity is located has ull jurisdiction to regulate its manufacture and pro-luction."

That this statement is patently so narrow as to be ncorrect may be seen from the following cases:

Stafford v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735.

Santa Cruz Fruit Packing Company v. *National Labor Relations Board*, 303 U. S. 453, 82 L. Ed. 954.

National Labor Relations Board v. *Fainblatt*, 83 L. Ed. Advance Opinions, page 646.

But, if this statement be conceded correct without qualification, there is still the question whether it is applicable to the case at hand. The rule might be appropriate if one were dealing with the power of Congress to regulate a business and the inquiry was whether the particular transaction formed a part of the flow of interstate commerce; but in the present case a different question is involved and a different rule must be applied. Here, a state has attempted by statute to impose an arbitrary condition upon the sale of a product destined for interstate commerce. As was alleged and proved by appellees, the condition was so burdensome and so severe as to cause *all* commerce of the independent canners, of which commerce 99% was interstate, immediately to *cease*. This result was not denied by appellant. Yet, appellant says that the statute imposed no burden on interstate commerce.

In *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032 (1934), the New York Milk Control Act was attacked in so far as it prohibited the sale within the state of milk brought from outside the state, unless the prescribed minimum price had been paid the producers outside the state. The court, in holding it was a burden upon interstate commerce and, therefore, unconstitutional, said:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there * * * Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, Sec. 10, Clause 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyong the power of a state, without the mention of an excep-

tion, by the provision committing commerce of that order to power of the Congress. Constitution, Art I, Sec. 8, Clause 3. 'It is established doctrine of this court that a state may not, *in any form or under any guise*, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112, 54 L. Ed. 678, 30 S. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and see *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; *Brown* v. *Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 S. Ct. 1091; *Webber* v. *Virginia*, 103 U. S. 344, 351, 26 L. Ed. 565, 567; *Kansas S. R. Co.* v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 58 L. Ed. 857, 859, 34 S. Ct. 564."

A very little analysis will be required to show that the Growers Cost Guarantee Law and the statute involved in the Baldwin case operate in a closely similar manner. Let us assume for the sake of argument that the arbitrary price set by the commission is ten cents per box above the current market price. Who will pay this extra ten cents? Certainly not the people of Florida, for their traffic is only from back yard to kitchen. Then, if paid at all—if Florida citrus is bought at all—this extra price must be paid by the consumers in other states and other countries.

In the case under consideration, the state statute required the grower to sell for ten cents more than his product is worth. What is the difference between this and the New York statute in the above case which prohibited the buyer from selling in New York, unless he had paid a certain price for his commodity? Is it not to the same extent an impost or a duty? Is it not the equivalent of a state statute requiring a buyer in interstate commerce to pay a tax of ten cents per box on his purchases? (*Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 83 L. Ed. 276.)

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, it was held that a state could not

impose any condition or regulation on the right of a foreign corporation to come into a state and buy commodities for interstate shipment.

In *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735, this court held that the business done in the various stockyards of the country by commission men and livestock dealers, between the receipt of the livestock from the ranges and farms of the west, in the yards, and the shipment of them therefrom to consumers in the east, is a part of interstate commerce, or is so associated with it as to bring it within the power of federal regulation. It will be noted that the character of this business, taken separately, is entirely local; yet, its effect upon interstate commerce was found to be so direct that the regulatory power of the National Government was upheld.

The appellees in our case are engaged exclusively in preparing grapefruit for interstate commerce. Any regulation that affects them affects interstate commerce; and any restraint that restrains them must restrain interstate commerce. To say that an effect is direct on one is to say that it is direct as to the other. As was proved by appellees, the direct and immediate result of the statute was the closing of the plants of appellees, for to operate was to be confiscated. The direct and immediate result of the closing was necessarily to stop the flow of Florida canned citrus products in interstate commerce.

This court, in *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, held that interstate commerce consisting of buying grain in one state, practically all of which was intended for shipment to and sale at terminal markets in another state conformably to the general and usual course of business in the grain trade, was unconstitutionally controlled and burdened by the provisions of a statute of the first state under which such purchases could only be made by those who held licenses from the state, paid state charges for the same, and acted under a system of grading, inspecting and weighing, fully

defined in the act; moreover, the grain could only be purchased subject to the power of the state grain inspector to determine the margin of profit that the buyer should realize upon his purchase, which was defined to be the difference between the price paid at the elevator and the market price, with an allowance for freight, at the terminal points to which the grain was shipped and sold.

As stated by the court:

> "* * * the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. *That this is a regulation of interstate commerce is obvious from its mere statement.*"

In the late case of *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. Ed. 1210, this court affirmed the holding in the *Lemke Case, supra*, and in reference thereto, among other things, said

> "the grain could only be purchased subject to the power of the grain inspector to determine the margin of profit the buyer could realize upon his purchase * * * the state officer was thus authorized 'to fix and determine the price' to be paid for grain which was 'bought, shipped, and sold in interstate commerce.' "

Further in the Lemke case in discussing *Dahnke-Walker Mill Company* v. *Bondurant*, decided December 12, 1921, 257 U. S. 282, 66 L. Ed. 239, 42 Sup. Ct. Rep. 106, the court says:

> "Applying the principle of that decision and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain which it purchased and sold under the circumstances as herein disclosed was interstate commerce. *Being such, the state could not regulate the business by a statute which has the effect to control and burden interstate commerce.*

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. *None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines* * * * The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276; *Eureka Pipe Line Co. v. Hallanan*, decided by this court December 12, 1921 (257 U. S. 265, 66 L. Ed. 227, 42 Sup. Ct. Rep. 101); and *United Fuel Gas Co. v. Hallanan*, decided the same day (257 U. S. 277, 66 L. Ed. 234, 42 Sup. Ct. Rep. 105).

"In view of this state of facts, we come to inquire whether the North Dakota statute is a regulation of interstate commerce, and, therefore, beyond the legislative power of the state."

After stating some of the essential provisions of the act, the court continues:

"Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 468, 59 L. Ed. 1406, 1411, 35 Sup. Ct. Rep. 896.

"It is contended that these regulations may stand upon the principles recognized in decisions of this

court which permit the state to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states. *This principle has no application where the state passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce* by imposing undue burdens upon it. This court states the principle and its limitations in the discussion of the subject in the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. In the course of the opinion in that case, we said (p. 400):

> 'The principle which determines this classification (between federal and state power) underlies the doctrine that *the states cannot, under any guise, impose direct burdens upon interstate commerce.*'

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce."

That this language is applicable in the instant case cannot be doubted. For what could more directly burden interstate commerce than a statute of a state saying "People of the nation, when fruit is scarce, you must pay all the grower wants for it. But when fruit is over-plentiful, we shall declare an emergency and we will not allow him to sell to you at a price less than his cost of production." In effect, this is to say, "Consumer, you must pay for Florida grapefruit either *market price* or *cost of production, whichever is greater.*"

In the *Lemke Case, supra*, the statute said, "Buyer, you must *pay* not less than a certain price"—this was

held an undue interference with interstate commerce. But what is the difference if the statute says, as it does in this case, "*Seller*, we will not allow you to *sell*" at less than a stated arbitrary minimum? Is not the interference as direct on one side of the transaction as it is on the other? The appellees certainly think so. And what burden could weigh more heavily—what interference could be more complete—than that which causes all traffic in a commodity to cease.

Following the decision in *Lemke v. Farmers Grain Co., supra*, another statute was passed by the State of North Dakota, which came before the court in *Shafer v. Farmers Grain Company*, 268 U. S. 189, 69 L. Ed. 909. The court found that about ninety per cent (90%) of the business affected was interstate commerce; that the statute authorized broad supervisory control with the view of "preventing" various practices deemed "unjust" or "fraudulent," that

> "a state statute, which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation and invalid, *regardless of the purpose with which it was enacted.*"

and this basis said:

> "We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

Not inconsistent is the case of *Highlands v. Agnew*, 81 L. Ed. 835, 300 U. S. 608, where a Virginia milk control bill was under consideration and the court held that it did not burden interstate commerce because it specifically applied only in Virginia. It will be noted that the

act specifically provided that none of its provisions "shall apply or be construed to apply to foreign or interstate commerce." The milk board had theretofore held that the plaintiff was not subject to the provisions of the act because he bought and sold milk in interstate commerce.

It cannot be too forcefully emphasized that the provisions of the statute in question are all negative. There is no regulation (in the real sense of the word), there is no correction of an evil, no attempt to simulate fairness by balancing against the rights and interests of the public, and of the packer, of the canner, and of the grower on the other hand. Volume of production, cost of labor, cost of processing, cost of marketing and distributing, volume of consumption, freight and express rates, climatic conditions, differences in soil condition and fertility, differentials in transportation rates of all kinds are completely ignored. One single price in this sizeable industry is set and no regard is had for market price, of any resale price, of consumer-value, or of any of the hundreds of other elements involved. Such a restraint cannot be otherwise than arbitrary and unreasonable.

In *Public Utility Commission* v. *Attleboro Steam & E. Company*, 273 U. S. 83, 71 L. Ed. 549, the court reasserted the principle that a state may not in any guise or in any manner directly burden or interfere with interstate commerce, even though the portion of the business devoted to interstate commerce is a relatively small percentage. In that case, 97% of the electricity generated by the Narragansett E. L. Company was consumed intrastate and less than 3% was delivered interstate to the Attleboro Company. Yet the power of the state to regulate this small portion was denied, even though the regulation might have "protected" to a certain extent the larger intrastate business.

It has been shown that nearly one-half of all grapefruit grown in Florida is canned and that over 99% of that canned goes into interstate or foreign commerce. Cer-

tainly, such a state of facts is well within the bounds of interstate commerce set in the above case, *Public Utility Commission* v. *Attleboro*, and the case of *National Labor Relations Board* v. *Fainblatt*, decided April 17th, 1939, 83 L. Ed., Advance Opinions, page 646. In the latter case the employer was actually not engaged in interstate commerce; yet, it was found that a strike or tie-up in his plant would have directly affected interstate commerce. On this basis, his employees were held subject to the National Labor Relations Act.

Appellants put much faith in *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. Ed. 1210, which involves a statute of Georgia fixing maximum prices for warehousemen to charge for the handling of tobacco. That case is not applicable for many reasons. It was pointed out in the opinion that the selling season is only from three to five weeks and the court found that the complainants "maintain and enjoy a virtual monopoly in the field covered by their operations" (page 448). In other words, the legislature was dealing with a monopoly which is not true in our case. It was also emphasized on two occasions in the opinion that the Georgia act did not attempt to fix prices (pages 455-459). Mr. Chief Justice Hughes intimated most strongly if the act had attempted to fix prices, it would have been unconstitutional.

The law seems to be well settled where a matter demands a general system or uniformity of regulation, Congress alone can so regulate but, if Congress has the power to enter that field and has not done so, the states may act within their respective jurisdictions until Congress sees fit to act *if the matter does not demand uniform regulation.*

Cooley v. *Port Wardens*, 12 How. 299, 13 L. Ed. 996.

Simpson v. *Shepard*, 230 U. S. 352, 57 L. Ed. 1511.

Sproles v. *Binford*, 286 U. S. 374, 76 L. Ed. 1167.

Just what matters demand uniform regulation have never been defined and a limited definition seems im-

possible. However, it does seem clear that the fixing of prices to be paid farmers and growers for their commodities which are sold throughout the United States is a matter that demands uniform regulation; otherwise, it is conceivable that the states might set varying prices to such an extent that interstate commerce would be tremendously burdened.

In *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U. S. 453, 82 L. Ed. 954, this court had occasion to discuss the commerce clause in connection with the National Labor Relations Act. The record of the case showed about 37% of the cases packed by the petitioners were shipped into interstate or foreign commerce, 9.02% being sent to foreign countries and about 28% to various points in the United States. The court held that the fact that fruits and vegetables handled by a canning company were grown within the state and that the activities of such company are confined to the state does not, where a substantial percentage of its products are sold by it in interstate and foreign countries, render the National Labor Relations Act inapplicable.

As we understand this opinion, it in effect held that although only 37% of the finished product of the cannery went into interstate commerce that its business so affected interstate commerce that Congress alone could pass laws affecting the business. In the instant case, we show that 99% of the finished product goes into interstate commerce and, therefore, an interference by the state would be a material burden on interstate commerce.

IV. The Regulation Is Void Because No Full Hearing Was Had by the Commission.

The record shows that the appellees, as plaintiffs below, charge in their complaint that the cost of production was not properly determined by the Florida Citrus Commission and that said regulation constitutes a denial

of the property rights of these appellees without due process of law (R. 13).

The Growers Cost Guarantee Law provides that after certain prerequisites "The Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit". (Appendix).

The regulation of the Florida Citrus Commission (Appendix) shows that the proclamation of the commissioner of agriculture of the State of Florida was dated January 13, 1939, and that petitions were filed with the commission requesting the commission to determine average reasonable cost of producing grapefruit, then states "hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be 32 cents for the citrus season of 1938-1939." The regulation is dated January 16, 1939, which was three days after the proclamation by the commissioner of agriculture.

The chairman of the Florida Citrus Commission filed an affidavit at the hearing (R. 40-41-42) and says that, on January 16, declaration of the commissioner of agriculture was presented to the commission together with petitions and that on the same day the commission considered fixing of the cost of production, that "after considering all of the information available relating to the cost of production of grapefruit, which information included compilation of data supplied by the chief field agent for the commission and the Agricultural Extension Service of the University of Florida, the commission found, determined and ordered that the average reasonable cost per standard packed box of producing grapefruit was 32 cents" (R. 42).

The chief field agent filed his affidavit at the hearing (R. 43-44) in which he stated that he gathered and compiled information from growers and shippers of grapefruit and had consulted with the Department of Agricul-

tural Economics of the Agricultural Extension Service of the University of Florida and submitted to the citrus commission, on January 16, an estimated figure showing the average reasonable cost per standard packed box of grapefruit to be 32 cents.

The economist of the Agricultural Extension Service of the University of Florida, likewise, filed an affidavit (R. 44) stating that he had studied the cost of producing citrus fruits in Florida, that he made available to the commission all information that he had regarding cost of production of grapefruit; that his information was arrived at by taking cost of production upon a representative number of citrus growers and that the estimated cost of production for grapefruit for the 1938-1939 season was arrived at by using the cost of production for previous seasons, due regard being held for the costs per acre and the probable production per acre, stating "The costs for the current season would have to be estimated as no definite cost per box could be arrived at until the entire crop has been harvested and the production per acre ascertained" (R. 44).

The foregoing is all the testimony in the record as to the procedure of the Florida Citrus Commission to *determine* the cost of production.

It is respectfully submitted to the court that the statute and regulation are void under the Fourteenth Amendment to the Constitution of the United States because, first, the statute did not provide for a full hearing before the cost of production was *determined* and, second, the procedure by the Florida Citrus Commission did not constitute a hearing as required by the decisions of this court in interpreting the Fourteenth Amendment to the Constitution.

(a), Notice and Hearing Are Primary Requirements in the Administration of the Act for the Determination of the Reasonable Cost of Production of Citrus Fruit.

A cardinal principle of administrative law is that under the Fourteenth Amendment of the Constitution any

action taken concerning one's property and rights is invalid unless there first be provided a full and fair hearing.

"The processes employed by administrative tribunals differ from those in the courts and in many cases are more summary. But administrative proceedings in a court of justice must conform to the essentials of due process of law. Notice and opportunity to be heard are generally just as essential in one proceeding as in the other. Hence, a state law establishing a commission for licensing real-estate brokers, where it authorizes the commission to require and produce proof of honesty of each applicant, would be unconstitutional if interpreted to mean that the commission might procure such proof secretly, without giving the applicant notice or opportunity to learn its nature and source to meet it.

"In courts of law, notice and hearing precede the adjudication. In many administrative proceedings a similar principle is operative. But in the latter type of proceedings, because of the urgency of public need or because of practical considerations of administrative efficiency or effectiveness prior notice and hearing is not always feasible. In such cases due process is afforded if the person whose property is affected is thereafter given an opportunity to test the validity or propriety of the administrative action.

"Any course of procedure which has for its object the taking of property to satisfy an alleged legal obligation and which yet accords no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land can hardly be termed 'due process of law.' The hearing which must precede the taking of property is not a mere form; the owner must have the right to secure and present evidence; he must be given the opportunity by proof and argument to controvert the claim asserted against him before a tribunal bound not only to listen but to give legal effect to what has been established."

Constitution of the United States of America, revised and annotated 1938, pages 908 and 909.

The pertinent part of the act reads as follows:

> "The Florida Citrus Commission shall *determine* and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit."

This section of the act, construed from the words therein alone, would be so indefinite and uncertain as to violate the due process clause of the Constitution.

Connally v. *General Construction Company*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322.

United States v. *Cohen Grocery Company*, 255 U. S. 81, 65 L. Ed. 516.

United States v. *Capital Traction Company*, 34 App. D. C. 592, 19 Am. Cas. 68.

Cline v. *Frink Dairy Company*, 274 U. S. 445, 71 L. Ed. 1146.

In *Connally* v. *General Construction Company, supra*, the court construed the statute of Oklahoma which put in force an eight-hour law and provided that construction on state work should pay "*not less than the current rate of per diem wages in the locality where the work is performed.*"

The court cites a number of precedents, including the case of *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 92, 41 S. Ct. 298, 301, 65 L. Ed. 516, 14 A. L. R. 1045, involving a statute which imposed a penalty for making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The court held that these words fixed no ascertainable standard of guilt.

The court cited the case of *U. S.* v. *Capital Traction Co.*, 34 App. D. C. 592, 19 Am. Cas. 68, in which a statute made it an offense for any streetcar company to run an insufficient number of cars to accommodate the passengers "without crowding," was held void for uncertainty.

(b) The Word "Determine" Means to Ascertain Definitely As the Result of an Investigation.

The word "determine" has been variously defined as meaning:

> "To adjudge; to ascertain definitely; to ascertain or state definitely; to come to a decision; to decide upon, as after consideration or investigation; to decree; to find out or ascertain the truth about the occurrence; to fix or settle definitely; to make specific or certain; to perform a judicial act; to put an end to; to set down authoritatively; to settle by authoritative or judicial sentence."
>
> 18 Corpus Juris 984.

> "To put or set an end to; to bring to a close; to terminate; to fix conclusively or authoritatively; to settle a question or controversy about; to decide by authoritative or judicial sentence; to come to a decision concerning as the result of an investigation."
>
> Webster's New International Dictionary, 1938 Edition.

In *Hillsborough County* v. *Henderson*, (Fla.) 33 So. 997, the question before the court turned upon the construction of a resolution for the issuance of bonds "bearing interest at a rate of not more than 4% per annum." The court said, page 997:

> "Is the provision that the interest shall not exceed a certain rate a compliance with the requirement that the rate shall be *determined*? 'To determine' is defined as meaning 'to ascertain definitely' or 'to settle,' and it is in this sense that the word is used in the statute. A provision which leaves for future determination the precise rate of the interest to be paid, merely limiting the range of the discretion to be exercised by those who shall ultimately fix it, cannot be said to determine the rate."

In *State* v. *Board of Education of City of Columbus*, 35 Ohio St. 368, the court had before it the construction of a statute of Ohio which provided that "each board of education shall determine the studies to be pur-

sued, and the textbooks to be used in the schools under their control, *and no textbooks shall be changed within three years after its adoption, without the consent of three-fourths of the members of the board of education given at a regular meeting.* The court said:

> "Under this, the board is to *determine* the textbooks to be used. What is the meaning of the word 'determine,' as here used, or what operation and effect ought to be given to it? When taken in connection with the purposes of the law, * * * and the subject matter to which it relates. * * * it is manifest that the word *'determine' must mean something more than investigation and arriving at a conclusion by mental processes,* although these are embraced. Official action is contemplated and required to give a practical effect to the word, and the injunction to do this mandatory upon the board; and in order that those who must obey may know the will of the board, it is necessary that it should be declared in such a way that it may be known."

In *Trust Company of America* v. *Safe Deposit Company*, 109 App. Div. 665; 96 N. Y. 585, 588, the court said that the certificate of a physician, authorizing a transfer to be made whenever the physician of either of the state prison reformatories or penitentiaries shall certify to the warden or superintendent thereof that a male prisoner confined therein for a felony is, in his opinion, insane, is not a "determination of incompetency" within either the spirit or letter of a statute (Code, Civ. Proc., Tit. 6, Ch. 7) relating to proceedings for the appointment of a committee of an incompetent.

The Georgia case of *Smith* v. *Board of Education of Walton County*, 164 S. E. 41, 43, involved the determination by the county commissioners of whether the majority of the registered qualified voters voted to consolidate school districts, and on page 43 the court said:

> "This brings us to consider and construe the language in said section that 'the result of such elec-

tion shall be *determined* and declared by the board of education.' Under this law two or more school districts can be consolidated only by a majority of the qualified voters of the district voting for consolidation. How is this to be determined? The statute expressly declares that it is to be *determined* by the board of education. The duty is put upon the county board of education to *determine* whether a majority of the qualified voters of the districts voted in favor of consolidation at such election. *This does not mean that the county board of education is simply to examine the returns of the election, count the number of votes cast for consolidation, and declare from the face of the returns whether a majority voted for consolidation or not.* This would put too narrow a construction upon this language of this section. To *determine* has been defined to mean to adjudge, to come to a decision, *to decide upon after investigation, to ascertain the truth about a transaction, to perform a judicial act, to settle by judicial sentence, and to try and put an end to it. Irvin* v. *State*, 9 Ga. App. 865, 868, 72 S. E. 440; 18 C. J. 984. So we are of the opinion that the board of education had authority, upon issue made, to determine whether a majority of the qualified voters of these districts had voted for consolidation, notwithstanding the fact that the returns of the election showed a different result."

See, also, *United States* v. *B. & O. R. Co.*, 293 U. S., pages 454, 462, *et seq.*, 79 L. Ed. 587, which involved the power of the Interstate Commerce Commission to require installation on locomotives of power reverse gear. Beginning on the last-mentioned page, the court said:

"Third. The railroads contend that to support the order *certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound.* This act does not confer upon the commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable. The operation of an engine, however equipped, involved 'danger of life or limb'

> * * * The report discusses, at some length, the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail; and concludes with 'finding' that, to a certain extent, the change should be made. But whether the use of any or all types of steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb,' *is left entirely to inference. This complete absence of 'the basic or essential findings required to support the commission's order,' render it void.*"

In order to *determine* the facts, as in this case in order to determine the reasonable cost of production it is necessary for the commission to obtain the facts. Without the facts, it can determine nothing. In order to determine the facts, it is necessary that it have a hearing, where evidence may be presented pro and con upon which and arising out of which the commission shall fix or determine what the reasonable cost of production is. This is necessarily so in this particular case for the reason that the commission was directed to ascertain and *determine* the reasonable cost. A one-sided investigation is not sufficient.

"While hearings before administrative bodies need not have all of the formality of judicial procedure but may be informal and, if suited to the matter involved, rather summary, yet there are certain elements of fair play required by the Constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals) those elements include (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort; (2) reasonable notice to interested parties; (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding" (citations omitted). *Chamber of Commerce* v. *Federal Trade Commission*, (C. C. A. 8, 1926) 13 F. (2d) 673.

The words "average reasonable" are indefinite and uncertain. The Florida Citrus Commission by a regulation, therefore, could not fix or determine an uncertain thing. What might be reasonable in one section of the State of Florida might seem unreasonable in another and to fix or determine the average reasonable cost for the entire State of Florida of an uncertain thing, the commission must procure the facts from evidence after a hearing.

The reasonable cost of production to the grower in this case may be likened to a reasonable rate to be charged by a common carrier; it must be based upon many circumstances.

In *Scharff-Kohen Mfg. Co.* v. *Atchison, T. & S. Ry. Co.*, 151 I. C. C. 270, the Interstate Commerce Commission holds that the reasonableness of rates is not a matter of mathematical computation or formula, but is one which necessitates consideration of the various elements of rate making.

The Supreme Court of the United States in *Smyth* v. *Ames*, 171 U. S. 361, 43 L. Ed. 197, holds that the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation.

In *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 51 L. Ed. 1128, 1134, the court says:

> "The question is one of reasonableness of a rate, and such question was said to be one of fact in *T. & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935."

In *T. & P. R. Co.* v. *I. C. C.*, 162 U. S. 197, 40 L. Ed. 940, 954, the court, speaking through Mr. Justice Shiras, says:

> "The question whether certain charges were reasonable or otherwise, whether certain discrimina-

tions were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."

To the same effect is *C., N. O. & T. P. R. Co.* v. *I. C. C.*, 162 U. S. 184, 40 L. Ed. 935.

From what has been said above, the following conclusions must be reached:

(1) That determination means finding of fact.

(2) Fact finding presupposes evidence.

Procedure is not regulation but embraces pleading, evidence and practice. In other words, notice, hearing, evidence produced and finding of fact are all essential to making a determination.

The regulation of the citrus commission violates all rules of administrative law and it clearly appears in this case that there has been no hearing after due notice with introduction of evidence and argument and, therefore, the regulation violates the due process of law of the Fourteenth Amendment to the Constitution.

A hearing, under this statute, cannot be had by this court or any other court. The duty of determining the reasonable cost was delegated to the commission and there is no provision in the statute for a review by the courts or by any other procedure. The duty is not delegated to the court and if the "average reasonable cost" has not been determined by the commission in accordance with due process of law, the regulation is void and unenforceable.

(c) Even a Hearing Granted As a Matter of Favor Is Not a Substantial Substitute for Due Process of Law.

Assuming, solely for the sake of argument, that the procedure of the Florida Citrus Commission in determin-

ing cost of production amounted to a hearing, it does not cure the fatal constitutional objection to the statute. The courts have universally held that a hearing is a matter of right and not a matter of favor.

In *Security Trust & S. B. Co.* v. *Lexington*, 203 U. S. 323, 333, the court by Mr. Justice Peckham, said, with respect to an assessment for back taxes:

> "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, *but the question is whether any notice is provided for by the statute.*"

In *Central of Ga. R. Co.* v. *Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, the court said:

> "This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace."

In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. Ed. 520, the court declared:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

In *Louisville & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, the court said:

> "The law itself must save the parties' rights and not leave them to the discretion of the courts as such."

In *Henry L. Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, the court said:

> "Nor can extraofficial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires."

(d) What Constitutes a Quasi Judicial Determination?

In McGehee on Due Process of Law, pages 370, 371, regarding notice and hearing, it is said:

> "When a regular rule or standard for the regulation of conduct or property has been framed, the application of the regulation to the circumstances of the individual involves a *judicial question* requiring the presence of that notice and hearing which in such circumstances is necessary to constitute due process of law."

Various courts have thus defined and characterized what they term "*quasi* judicial" functions or matters. Thus in *Bair* v. *Struck*, 74 Pac. 69, 71 (Mont.), the court quotes from certain standard authors to the following effect:

> "But, if the contention of the appellant be sustained, the distinction between ministerial and *quasi* judicial acts is practically abolished. As distinguishing between acts *quasi* and acts ministerial in their character, the following definitions, we think correctly state the law:
>
> > 'Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi* judicial.' Meehan on Public Officers, Sec. 637; Bishop on Non-Contract Laws, Secs. 785, 786. 'Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally "*quasi* judicial" * * * The officer may not in strictness be a judge; still, if his powers are discretionary, to be exerted

> or withheld according to his own view of what is necessary and proper, they are in nature judicial.' Throop on Public Officers, Sec. 534."

See for similar definitions the words "*quasi* judicial" as defined in Words and Phrases, as well as the following authorities:

Oakman v. *City of Eveleth*, 203 N. W. 514, 517, 163 Minn. 100 (Minn.).

In re Courthouse of Okmulgee County, 161 Pac. 200, 201, 58 Okla. 683 (Okla.).

State v. *Ross*, 228 Pac. 636, 31 Wyo. 500 (Wyo.).

People ex rel. Schau v. *McWilliams*, 77 N. E. 785, 789, 185 N. Y. 92 (N. Y.).

The decisions of the United States Supreme Court have also frequently given a similar definition to what they term "*quasi* judicial" matters, in holding that notice and a hearing under the Fourteenth Amendment to the Constitution must accompany the determination of such matters by public administrative officers. For example, in the case of *Morgan* v. *United States*, 298 U. S. 468, 480, 80 L. Ed. 1288, there was involved the legality of the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies for buying and selling livestock. The court says to "determine," as a condition of his action, that the existing rates are or will be "unjust, unreasonable, or discriminatory," and if and when he so finds, he may "determine and prescribe" what shall be the just and reasonable rate, or the maximum or minimum rate to be charged, the court then adds:

> "That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. *There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact.*"

The court then, on page 480, thus characterizes the kind of matter such determination involves:

"A proceedings of this sort requiring *the taking and weighing of evidence, determination of fact based upon the consideration of the evidence*, and the making of an order supported by such findings *has a quality resembling that of a judicial proceeding.* Hence, it is frequently described as a proceeding of a *quasi* judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusions uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. *If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.*"

In the second decision of the case of *Morgan* v. *United States*, reported in 304 U. S. page 1, 82 L. Ed. 1129, this court in discussing the sufficiency of the hearing given by the Secretary of Agriculture in fixing the minimum rates to be charged by marketing agencies said:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principle that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a *quasi* judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' * * * essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.

> Such a hearing has been described as an 'inexorable safeguard.' *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720; *Ohio Bell Teleph. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724; *Railroad Commission* v. *Pacific Gas & E. Co.*, 302 U. S. 388, 393, *ante*, 319, 58 S. Ct. 334, 82 L. Ed. 319; *Morgan* v. *United States*, 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906, *supra*. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.'"

The same characterization of the determination of such questions is found in the leading case of *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431.

In *Southern Ry. Co.* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 194, 78 L. Ed. 260, the court held that a statute of Virginia, as construed by the highest court of that state, was invalid because it did not require a hearing before making a determination and said:

> "Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts * * * the character of a crossing and what is necessary for the public safety and convenience * * * without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation."

Again on page 197 of the opinion, we find:

> "Counsel submit that the legislature without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same may be accomplished in any manner which it deems advisable without violating the Federal Constitution. *But we*

assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, *it by no means follows that an administrative officer may be empowered without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence.* In *theory*, at least, the legislature acts upon *adequate knowledge after full consideration* and through members who represent the entire public.

"Chapter 62 undertakes to empower the highway commissioner to take railway property if and when he deems it necessary for public safety and convenience. It makes no provision for a hearing, and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power unless the indefinite right of resort to a court of equity referred to by the court below affords adequate protection."

Another recent decision wherein the court held that the Constitution itself required a notice and hearing, even though the statute under which the action was taken did not do so, is *Boeing Air Transport* v. *Farley*, 75 F. (2d) 765, 767, decided by the United States Court of Appeals for the District of Columbia. This was a suit to restrain the Postmaster General from enforcing an order which annulled certain air mail contracts. The government contended that notice and hearing preliminary to terminating the contracts was not required by the statute under which they were terminated and were not essential, but on this point the court said, on page 767:

"Plaintiffs, however, contend that it is elemental law that any attempt to deprive a person of his property without first according to him notice and hearing is void, in that it violates the Fourteenth Amendment to the Constitution of the United States, providing that 'no person shall be * * * deprived of life, liberty, or property, without due process of law.'

On the other hand, counsel for the government contend that notice and hearing, by the terms of the statute, are not essential to the issuance of a valid order of annulment by the Postmaster General. Section 3950, *supra*, does not expressly provide for notice and hearing as a condition precedent to the annulment of a mail contract; *but we are of the opinion that a provision for notice and hearing may, by implication, be read into the statute, for otherwise it would be clearly unconstitutional. Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260."

Particular attention is called to the case of *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 301 U. S. 292, 81 L. Ed. 1093. This case involved the legality of the procedure of the State Public Utilities Commission of Ohio in fixing the value of the telephone company's property for rate-fixing purposes and said

> "*There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay*, when that minimum requirement (of a full hearing) has been neglected or ignored."

(e) A Full Hearing Requires Evidence Adequate to Support Pertinent Necessary Findings of Fact.

Morgan v. *United States*, 298 U. S. 468, 80 L. Ed. 1288.

Same Case, 304 U. S. 1.

In the first *Morgan Case*, in 298 U. S. 468, the court said:

> "Congress has required the secretary to *determine* as a condition of his action, that the existing rates are or will be 'unjust, unreasonable or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the minimum or the maximum rate, thereafter to be charged. *That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural require-*

*ments. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. * * *. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based upon the evidence must embrace the basic facts which are needed to sustain the order.*

"A proceedings of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding."

In the second Morgan case the facts were as follows: This case involved the maximum rates to be charged by the Secretary of Agriculture. In that case a hearing was had. The findings however, were made by the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the government, and were submitted to the secretary who signed them, with a few changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. No opportunity was afforded Morgan for examination of the findings thus prepared in the Bureau of Animal Industry until appellants were served with the order. He sought a rehearing before the secretary but without avail. The secretary did not examine all of the evidence. He had several conferences with the solicitor of the department and with the officials in the Bureau of Animal Industry and discussed the proposed findings. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion:

"My independent conclusion was based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of men in the Bureau of Animal Industry."

The Supreme Court says, page 18, "save for certain rate alterations he 'accepted the findings.'" The court says that the secretary read the summary presented by appellant's briefs and he conferred with his subordinates who had sifted and analyzed the evidence, and the court said it assumed that the secretary sufficiently understood its purport. On this question the court says:

> "But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants."

Further on the court says:

> "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps."

We call the court's attention particularly to the facts in that case because they are almost identical with our case; in other words, in that case the secretary states that his conclusions were based upon the findings of men working for him. That is exactly what happened

in this case. That case is even stronger than ours because in here the citrus commission did not even make independent findings but merely adopted the opinion of the chief field agent (R. 41).

See, also, *Southern Ry. Co. v. Virginia, supra.*

In *Chicago, M. & St. P. R. R. Co. v. Minnesota,* 134 U. S. 418, 33 L. Ed. 970, the court in holding invalid an act permitting the state commission to make rates without notice, said:

> "It deprives the company of its right to a judicial investigation, by due process of law—no hearing is provided for, no summons, or notice to the company before the commission has found what it is to find and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

In *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, in passing upon the claim made by the Interstate Commerce Commission of its power to base its *determination* as to rates on its opinion, whether supported by facts or not, the court said:

> "A finding without evidence is arbitrary and baseless. And if the government contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power. In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if

that granted was inadequate or manifestly unfair, if the finding was contrary to the 'indisputable character of the evidence.'"

In the case of *Omaha* v. *Omaha Co.*, 218 U. S. 180, 54 L. Ed. 991, the same doctrine is laid down.

St. Joseph Stock Yards v. *U. S.*, ~~296~~ 298 U. S. 38, 80 L. Ed. 1033.

Ohio Bell Tel. Co. v. *Pub. Util. Com.*, 301 U. S. 292, 81 L. Ed. 1093.

R. R. Comm. of Cal. v. *Pac. Gas & Elec. Co.*, 302 U. S. 388, 82 L. Ed. 319.

Chicago Junction Case, 264 U. S. 258, 265, 304, 68 L. Ed. 667.

Binkerhoff v. *Hull*, 271 U. S. 683, 70 L. Ed. 1150.

Norwegian v. *U. S.*, 288 U. S. 294, 77 L. Ed. 796.

It was the duty of the commission to hold hearings, receive evidence, and determine facts upon evidence and the fact that it did not take sufficient time cannot excuse the want of a full and fair hearing.

This question has been expressly decided, February 27, 1938, in *Western Union Telegraph Co.* v. *Industrial Commission of Minnesota*, 24 Fed. Supp. 370. That case involved the sufficiency of a hearing granted by the Minnesota Industrial Commission before putting into effect its order establishing minimum wages of women and minors employed in industries in that state. It appears that the commission about June, 1937, appointed an advisory board, so-called, consisting of eleven members. This advisory board, having made a study and investigation, *but without holding public hearings*, made its report and recommendation to the commission. The commission, after giving published notice, held a hearing on April 11, 1938, with respect to minimum wages for women and minors of ordinary ability and for learners and apprentices, at which it appears that employers, employees and other interested persons presented themselves and made *statements* as to wages, profits and

other pertinent matters. At this hearing, *no evidence* by or on behalf of the commission was introduced; the factual or evidentiary basis for the order which the advisory board recommended and which the commission proposed to make, was not disclosed; and no witnesses were permitted to be sworn or examined, and no documentary evidence was introduced. Those present who desired to be heard were limited by the chairman of the commission to brief statements of the reason why they were opposed or in favor of the proposed order fixing minimum wages. *The lack of time of the commission to hear at length from all interested parties was stressed by the chairman.*

The court considered most of the recent authorities discussed in this brief, including the *Morgan Case, supra,* and the *Ohio Bell Tel. Co. Case, supra,* and held that the orders of the commission were invalid under the statute. The court said, page 377:

> "To determine what constitutes a minimum living wage for women and minors employed in Minnesota under the standards fixed by the Minimum Wage Law of the State of Minnesota would seem to call for something more than mere administrative or executive action. It would seem to require the gathering and weighing of evidence and the exercise of judgment in determining important, difficult and controversial questions of fact. Unless the action of the commission in this regard is executive merely its procedure must include a full hearing, and there must be evidence. *Morgan* v. *United States,* 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288."

In *Ohio Bell Tel. Co.* v. *Public Util. Com., supra,* the court, speaking through Mr. Justice Cardozo, at page 305, says:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

For other representative cases on this point, see:

Oertel v. *Glenn*, 13 Fed. Sup. 651

United States v. *Cohen Gro. Co.*, 255 U. S. 81, 65 L. Ed. 516.

Connally v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322.

Small v. *American Sugar Refining Co.*, 267 U. S. 233, 69 L. Ed. 589.

Therefore, the statute in failing to provide for public hearing does violate the Fourteenth Amendment of the Constitution of the United States and if the court, in an attempt to hold the act constitutional, should write into the act a provision for the hearing then we have shown to the court that there was no hearing by the Florida Citrus Commission and that the regulation is therefore void and unenforceable.

V. The Citrus Commission Illegally Attempted to Put the Statute into Effect in That It Failed to Procure Binding Agreements from Producers, Shippers and Handlers Not Subject to the Provisions of the Act.

The Growers Cost Guarantee Law provides "after the citrus commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this act, binding agreements to conform thereto and abide by its terms" the commission shall determine the cost of production (R. 19).

The opinion of the three-judge court refers to this provision of the act and says "failure to comply with it may not render it violative of the Constitution but certainly requires enjoining the commissioner from enforcing the fixed price" (R. 80).

Having acquired jurisdiction, the court had power to decide all questions involved even though not constitutional questions. *Fisher* v. *Brubaker, supra; L. & N.* v. *Garrett, supra;* and *Sterling* v. *Constantin, supra.*

It is admitted, by the regulation, that the citrus commission did not comply with said provision of the statute where it states:

> "Whereas, the Florida Citrus Commission has determined that all *citrus fruit dealers* handling grapefruit now being grown in the State of Florida are subject to the provisions of said act" (R. 31).

The legislature said that there were *producers, shippers,* and *handlers* not subject to the act. The commission *determined,* without any hearing or notice, that *dealers* were not subject to the act and, therefore, it did not attempt to get any agreements from *producers, shippers,* or *handlers.* We are reminded of the expression in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 67 L. Ed. 322, text 326, "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than a constitutional way of paying for the change." Clearly, the citrus commission did not determine that there were *producers, shippers,* or *handlers* not subject to the act but determined that it was too much trouble and would take too much time to comply with the act. The provision was put into the statute by the legislature so that if the statute were to be put into effect it would affect all alike; those not subject to the provisions of the act would be subject to agreements theretofore executed by them so that all would be affected alike. The commissioner of agriculture interpreted the act not to apply to grower-owned canneries or to co-operative canneries but the citrus commission had failed to get any binding agreements from these canneries. The only producers, shippers or handlers of the citrus commission subject to the act are those who deal directly with the grower; those who purchase the fruit on the tree from the grower; all others are not subject to the act.

Assuming, for the sake of argument, that the commissioner was correct in his interpretation that the act did not apply to a cannery which owned its own groves, then those dealing with such cannery for the purchase of the canned product would not be subject to the act. Yet, the commission did not have those dealers sign the agreement as provided by the statute.

In short, the commission took it upon itself to tell the legislature that it was in error in saying that there were any handlers of fruit not subject to the act. It assumed jurisdiction to make a determination of a fact without any authority whatsoever. The legislature provided that the Florida Citrus Commission should determine the cost price when and only when it had procured the agreements from the *producers, shippers* or *handlers* not subject to the provisions of the act.

The importance of the provision is emphasized in Section 4 of the Act which provides that the provisions thereof shall apply to any one or more of the citrus varieties "as may be determined by the petitions and *agreements* provided for in the foregoing section" (R. 20).

Without agreements, then how could the citrus commission say that the act should apply only to grapefruit? Suppose those not subject to the provisions of the act were unwilling to sign an agreement to abide by the statute in connection with the sale of grapefruit alone, could the commission have overridden the enactments of the legislature and put the law into effect as to grapefruit alone? Of course, the answer is, obviously, *no* and without any agreements determining which variety or varieties should be subject to the act the commission was powerless to say that the act would apply to one variety only.

If the commission can disregard the requirements of the act as to obtaining agreements, it could just as reasonably disregard the requirement that there must first be a declaration by the commissioner of the existence

of a state emergency. One provision is just as important and necessary as the other.

It is respectfully submitted to the court that the three-judge court was correct in holding that the act could not be enforced because the commission had failed to comply with the important conditions precedent.

Appellants argue that the provision under discussion was merely directory and cite as authority *Apgar* v. *Wilkinson,* 116 So. 78, 95 Fla. [illegible]. That case is not applicable to the situation that we have. In the first place, the Supreme Court of Florida in the Apgar case was considering a special act of the legislature where the words "authorized and required" were involved. To hold that these words were mandatory would make the act violative of the state constitution. Considering the act in its entirety, the court reached the opinion that these words "constituted an authorization or clothing of the said county commissioners with power and authority to do the things enumerated in the act." The court further said "we understand the general rule to be that, where mandatory words or provisions are written in the statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless something in the body of the act is indicative of the contrary view." If that statement is a correct statement of the law, then the application of the same to the statute involved in this case results in the necessary conclusion that the provision is absolutely mandatory.

Suffice it to say that the following section in the act says that the variety of the citrus shall be determined by the *petitions* and *agreements.* It was very essential that agreements be obtained in order to determine what variety or varieties were to come under the provisions of the act.

Appellants further say that the provisions could be given no sensible effect, therefore, it should be entirely disregarded. Competitors of the appellees were not sub-

ject to the act; that is, co-operative canners, who were canning thousands of cases and not providing for the grower to receive 32 cents a box. These were handlers not subject to the act and agreements should have been obtained from them by the commission. Some growers were canning their grapefruit and selling the finished product at a price which did not net to the grower 32 cents per field box on the tree. The commissioner of agriculture construed the act to mean that it did not apply to these handlers. Not only were the appellees suffering from competition of canners in other states, who were not subject to the act, but they were suffering from competition at their own back doors by co-operative and grower-owned canneries which were not subject to the act. This condition was brought about by the failure of the Florida Citrus Commission to comply with the provisions of the statute.

The statute provides that "*after the citrus commission shall have procured*" and appellants claim that this is only directory but it must be borne in mind that a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory. *Board of Education* v. *State*, 131 So. 239, 222 Ala. 70; *Stevens* v. *Tillamook County*, 273 Pac. 716, 128 Ore. 339; 59 C. J. 1074. Such provisions are also mandatory when they are antecedent and prerequisite conditions which must exist prior to the exercise of power. *Spencer's Appeal*, 61 Atl. 1010, 78 Conn. 301; 59 C. J. 1074; *State* v. *Farney*, 54 N. W. 862, 36 Neb. 537; *Spruill* v. *Davenport*, 100 S. E. 527, 178 N. C. 364; 59 C. J. 1075. It has also been held that statutes which clothe a public body or officer with power to perform acts which concern the public interests are mandatory.

The Supreme Court of Florida in *Seaboard Air Line* v. *Wells*, 130 So. 587, in construing a statute using the word "*may*" in designating the matters to be taken into consideration by the railroad commission upon an application, said:

> "Where a statute says that a thing 'may' be done by a public official, or official body, which is for the public benefit, it is generally to be construed to mean that it must be done" (citing several other cases).

It is contended in the complaint that the commissioner also failed to obtain petitions signed by persons, firms, corporations, or associations owning or controlling 50% or more of the producing acreage of citrus fruit. However, we must admit that the only evidence now before the court tends to show that the commission did comply with that provision and, as far as this appeal is concerned, appellees will waive that point.

VI. The Appellant Commissioner of Agriculture Is Without Authority to Revoke the Licenses of the Appellees Because of Their Failure to Comply with the Growers Cost Guarantee Law.

It is alleged in the complaint and admitted by respondent that the commissioner of agriculture had warned the plaintiffs that their licenses would be revoked if they operated canning plants and did not pay the producer at least 32 cents per field box (R. 32).

The commissioner of agriculture contends that he has this authority under the statute of Florida known as the Bond and License Act (R. 20) which provides for the licensing of citrus fruit dealers and also provides for suspension and revocation of the license of any dealer

who violates the provisions of said act or "if he violates any provision of any other law of the State of Florida governing and applicable to citrus fruit dealers" (R. 27). Just what was meant by the legislature by this provision is difficult to determine. The Bond and License Act was passed in 1935 and the Growers Cost Guarantee Law was passed at the same session of the legislature but subsequent to the Bond and License Act. Would the act mean any other laws then in existence or that may thereafter be enacted? Since it is purely statutory and since the legislature could not have had in mind any laws that it might thereafter pass, it must of necessity have referred to laws then in existence. The Growers Cost Guarantee Law provides no penalties whatsoever for violations thereof but merely creates a liability on the purchaser of citrus fruit to the grower of an amount equal to 32 cents per field box for the grapefruit. It is a law within itself and only to take effect under certain conditions therein named.

The Bond and License Act provides for the posting of a bond by the dealers conditioned upon compliance with the act and faithful compliance with conditions of all contracts made with producers. If the Growers Cost Guarantee Law is valid, the grower has recourse under the provisions thereof against the dealers, or in our case the canners, who do not pay him the full 32 cents per field box, and the bond is up to protect him.

The commissioner of agriculture is thereof without authority to revoke the licenses of the plaintiffs or either of them for their failure to comply with the Growers Cost Guarantee Law.

VII. The Statute Is So Vague, Indefinite and Ambiguous That It Is Unenforceable.

To argue this point at this place in the brief would unduly burden the court with repetitions of our arguments that were heretofore made in this brief. The mere reading of the statute shows that it is so indefinite and ambiguous that it is unenforceable. The Florida Citrus Commission recognizes this fact in their resolution when it admitted that it is unable to comply with the provisions thereof because it could not find any dealers who were not subject to the act as it was required to do by the act.

The statute states that any contract, plan, scheme or device, whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this state, but in all other respects and particulars contracts of sale, marketing and processing "shall be valid and binding and the terms thereof shall measure the rights of the respective parties. In one breath, it says any such contract shall be unlawful and against public policy but, in the next breath, it says that in all other respects, the contracts shall be valid. What this means is beyond our apprehension.

The statute further provides that petitions must be signed by persons, firms, corporations or associations owning or *controlling* 50% or more of the producing acreage. Certainly, the word "*controlling*" has no definite meaning. It is sometimes said that a mortgagee controls a business that is heavily mortgaged to him. With the citrus groves of Florida heavily mortgaged, did the legislature mean that the citrus commission should have the petitions signed by the mortgagees? For years, fruit dealers

in Florida have made arrangements with grove owners to sell their fruit for them on commission basis. In that case, who controls the acreage; the owner or the broker? Which one should sign the petition? In the obtaining of fertilizer, the grove owners find it necessary to mortgage their crops to the numerous fertilizer companies in Florida. They cannot sell without the agreement of the holder of a chattel mortgage. In such a case, who controls the acreage? Many of the owners of Florida citrus groves live in the north and have caretakers in the groves in full control of the grove. The caretaker has no authority to sell without the permission of the owner. In that instance, who controls the groves? We could go on indefinitely pointing out factual situations which tend to clearly confuse any attempt to define the word *control*. The act is so ambiguous that it is unenforceable.

G. CONCLUSION.

The court will recognize that there have never been any similar statutes attempted and, therefore, no cases directly in point and it has been necessary to cover a wide field in urging to the court the announcements which have been made in other cases and which we believe set forth principles that should control the decision in this case. It was once said "There is nothing new under the sun." The author of that statement never saw the Growers Cost Guarantee Law.

It is respectfully submitted to this court:

(a) The lower court had jurisdiction of the parties and of the subject matter.

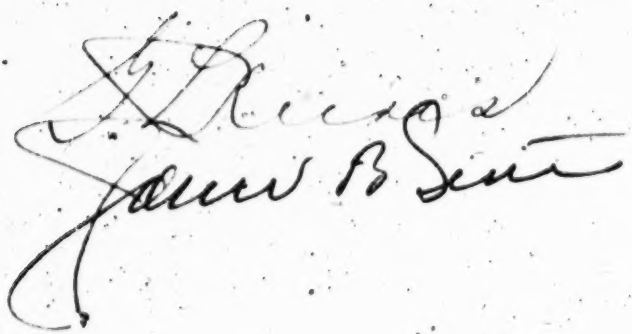
(b) Grave federal questions were involved, and the court, therefore, could determine any other questions in the case.

(c) That the plaintiffs, representing by far the majority in volume of the canning industry of the State of Florida, have shown urgent need for injunctive relief.

(d) The three-judge court did not abuse its discretion in issuing the interlocutory injunction to protect the appellees, until further order of the court.

The order of the court issuing the temporary injunction which is the only order before this court should be affirmed.

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IN UNITED STATES DISTRICT COURT.

Opinion—Filed May 3, 1939.

This case was argued and submitted on April 10th, 1939, on the bill and testimony.

The defendants appeared and though they had not filed answers, argued the case and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved.

The Act is found in Florida Acts of 1935, page 268.

Grower's Cost Guarantee Law.

An Act relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements.

Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this state to the extent that such fruit has been and is continuing to sell in many cases at prices below

the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida citrus fruit in the market and to stabilize the Florida Citrus industry and to protect the public and the growers against fraud, deception and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

Therefore, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare,

* * * * * * * *

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form

annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

We are not concerned with sections one and two, but the provisions of Section three raise all the questions with which we are concerned.

Taking up these in the order of their importance, we consider whether it violates the due process clause of the Fourteenth Amendment. We are aware of the fact that many of the later decisions on the due process clause have gone far beyond the earlier ones.

The latest authoritative decision in which this question is discussed is *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 491, which says:

> "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not

recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguard is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the fourteenth amendment had been broadly described.

But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co.* v. *McGuire*, 210 U. S. 549, 567.

The definition of due process here given contains two positive requirements. First: the regulation must be as applied to the Citrus business, reasonable. To be reasonable, it must not be arbitrary, nor should it be unjust to any of those whom it undertakes to regulate. Second: It must have been adopted in the interests of the community. In other words, the community or the public must have an interest in or be concerned with such regulation.

The protection of the public should be the prime purpose of the regulation and not the business to be regulated.

Take the citrus industry as a whole and it is manifest that it is as much dependent on the canners as upon the growers, for we all know that the fruit in its natural state cannot be sto ed for future sale as grain is done, but that the juices when processed and canned can be. So if the crop is raised too large to be sold as gathered, the price of the fruit will be greatly reduced and the loss much greater than if the excess fruit is canned and the juices stored for future sale. The canner who processes the fruit and preserves the juice plays an important part in buying the excess fruit and processing it. The Act recognizes the canners in the reference to "the fruit and the juices thereof," and to processing the same.

The testimony showed that this year's crop is large, and the Citrus Commission fixed the cost to the grower of raising the crop of grapefruit at thirty-two cents a box, and that the canner could not pay that price and the cost of processing it and sell the juice without suffering a loss.

It further showed that the canners had established business of years standing with a large investment, employing several thousand employees.

That they had made contracts for sale of juice for future delivery and that they were forced to cancel when the cost price was fixed by the Commission.

The effect of this was that the canners were penalized for the benefit of the growers if the canners continued business.

The testimony also showed that many of the growers had organized cooperative corporations to process their grapefruit, the coope ative did not pay cash for their fruit to these growers, but credited them with the amount of the price of the fruit and were not expected to pay for it unless the market prices enabled them to pay it, and the Commissioner did not enforce payment while requiring payment of the regular canners.

This certainly was discrimination against the canners, and the Commissioner must have construed the Act so as to authorize him to do this.

The Act makes a sale for less than the price fixed unlawful. Suppose the price fixed by supply and demand is less than that fixed by the Commission, a sale by a grower for any less price would be unlawful.

If his actual cost of raising his crop were ten thousand dollars, he could not sell it for eight thousand dollars and so minimize his loss, but would be compelled to let it spoil on the trees and so lose the whole crop.

Is not this alone sufficient to make the Act arbitrary and prejudicial? We find the Act unconstitutional.

There is one other feature of the Act which may not render it violative of the Constitution, but certainly requires enjoining the Commissioner from enforcing the fixed price.

The Act provides that after the Citrus Commission shall have procured from shippers, producers or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the annual reasonable cost per standard box, of producing citrus fruit, etc.

There is no proof in the record of any such consent and agreement having been secured by the Commission.

We therefore conclude that the injunction should be granted.

LEON MCCORD,
U. S. Cir. Judge;

ROBERT T. ERVIN,
ALEXANDER AKERMAN,
Judge.

April 13, 1939.

Whereas, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the citrus industry, under authority of Chapter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

Whereas, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

Whereas, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and

Whereas, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, have proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) for the entire citrus fruit season 1938-39;

Now, Therefore, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with

the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D. 1939, and shall become effective at 12:01 a. m. Friday, January 20th, A. D. 1939.

Florida Citrus Commission,
By John Maxcey,
Chairman

Attest: Chas. F. Chastain,
Secretary (Seal)

p. 3 of dissent.

SUPREME COURT OF THE UNITED STATES.

No. 270.—October Term, 1939.

Nathan Mayo, as Commissioner of Agriculture of the State of Florida, et al., Appellants,
vs.
Lakeland Highlands Canning Co., Inc., et al.

Appeal from the District Court of the United States for the Southern District of Florida.

[February 26, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellees, corporations of Florida and other states, and individuals, engaged in the canning of citrus fruits in that state, filed their bill in the District Court for Southern Florida against Nathan Mayo, as Commissioner of Agriculture of Florida, praying injunctions, temporary and final, to restrain him from cancelling their licenses as citrus fruit dealers, from enforcing against them a regulation made pursuant to a state statute, and from interfering with the conduct of their business by reason of their failure to comply with the statute.

On presentation of the bill and motion for temporary relief, the court issued a restraining order and convened a court of three judges. The Florida Citrus Commission was permitted to intervene as a defendant. After hearing on affidavits, filed by appellees and appellant Mayo, and, on evidence offered by the appellees, the court granted a temporary injunction pending final hearing.[1] The Commissioner and the intervenor have appealed.

The bill alleges the importance of the grapefruit canning industry in the State, and asserts that the appellees, in the conduct of their business, packed over sixty per cent. of the total grapefruit and grapefruit juice canned in the State in seasons prior to that of 1938-1939. It recites the adoption by the legislature of the

[1] 28 F. Supp. 44.

Growers' Cost Guarantee Act (Chap. 16862 of the Acts of 1935) which, after declaring that the production and distribution of citrus fruit is a paramount industry of the State, upon which the prosperity of the State largely depends, and assigning reasons for the protection of the industry and the maintenance of prices commensurate with the cost of production of citrus fruit, authorizes the Commissioner of Agriculture, in his discretion, with the consent and advice of the Governor, to declare the existence of an emergency in the industry; and provides that, if he does so, then,—upon petition of owners or controllers of fifty per cent. or more of the producing acreage of citrus fruit, and, upon procurement by the Florida Citrus Commission from producers, shippers, or handlers, not subject to the provisions of the act, of binding agreements to conform thereto and abide by its terms,—the Commission shall determine and record annually the average reasonable cost, per standard packed box, of producing citrus fruit. The statute provides that, thereupon, every contract with a grower for the purchase of fruit is to be held to require the purchaser to pay the grower a price per box equal to such ascertained and recorded cost; and continues: "Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale . . . shall be valid and binding and the terms thereof shall measure the rights of the respective parties." By its terms the act is to apply to any one or more of the varieties of citrus fruit.

The complaint further refers to the Bond and License Act (Chap. 16860, Laws of Florida, 1935, as amended by Chap. 17777, Acts of 1937), which requires every dealer (which term includes processors of citrus fruit) to take a license and provides that if the Commissioner determines that any dealer has violated the provisions of any applicable act he may suspend or revoke the license of the offender. Operation as a dealer without license is made a misdemeanor.

The bill alleges that the packing season for canning citrus products in Florida begins about November 1st of each year and continues until June or July of the following year; that preparations for canning include the ordering of cans, labels, contracting

for purchase of fruit, securing labor, planning of factory operations, and obtaining orders for the product.

It is alleged that, under the Growers' Cost Guarantee Act, the appellant Mayo, as Commissioner of Agriculture, with the consent and advice of the Governor, declared an emergency in the citrus industry on January 13, 1939, and that the Citrus Commission passed a resolution January 16, 1939, reciting that more than fifty per cent. of the owners or controllers of producing acreage of grapefruit in the State have requested the Commission to determine the cost of production of grapefruit, fixing the cost per standard packed box at thirty-two cents for the season 1938-1939, and decreeing that every contract with a grower shall be held to require that the purchaser shall, in any event, pay the grower the amount so fixed as the cost of production.

The bill states that the expected pack of grapefruit for the season 1938-39 was large, but that, due to the regulation, the output of the canned product has been less, by two million cases, than that of the previous season; that, since January 19, 1939, each of appellees has been offered quantities of grapefruit by Florida growers, at prices ranging from twelve cents per box for fruit to be processed into juice, to twenty-five cents per box for fruit to be canned into sections or hearts, and that, but for the regulation in question, each could, and would, have purchased such fruit, canned the same, and sold the canned product at a large profit; that, as a result of the regulation, much of the fruit remains unsold and is spoiling.

The bill further asserts that many growers own their own canning plants and may, therefore, process their fruit without being subject to the burden of the Cost Guarantee Law; and that many growers, with like immunity, process their fruit through cooperative organizations to which the Commissioner does not apply the cost price provisions of the law and regulations.

According to the bill a large proportion of the Florida canned fruit is sold in interstate and foreign commerce and much of it competes with that produced in other states which brings lower prices, and, consequently, the appellees cannot pay thirty-two cents per box and sell in competition with fruit elsewhere processed.

It is further averred that one of the appellees had made binding contracts of purchase prior to issue of the regulation, the obligation of which has been impaired thereby.

After alleging that each appellee has a large investment; that the payment of thirty-two cents per box would render it impossible for them to sell their processed grapefruit except at a loss; that the enforcement of the regulation will cause them large losses and irreparable damage; that if they do not comply with the regulation the Commissioner will revoke their licenses, and that, if he should do so, they will be compelled to suspend business or subject themselves to risk of fine and imprisonment under the Bond and License Act, the bill charges that the Growers' Cost Guarantee Law, as administered and as applied to them, is unconstitutional and void as illegally attempting to regulate interstate commerce, as violating the equal protection clause of the Fourteenth Amendment, because discriminating between cooperatives and the complainants, as taking their property without due process of law, and as impairing the obligation of contracts. The bill also challenges the regulation on the ground that the Commission failed to ascertain, in accordance with the law, that fifty per cent. of the owners or controllers of acreage had requested regulation and also failed to observe the condition precedent to making any order, namely, that all persons not subject to the provisions of the act should execute binding agreements to be governed thereby.

At the time of hearing and decree for preliminary injunction no answer or motion to dismiss had been filed. The court in its opinion stated that the defendants had appeared and, though they had not filed answers, argued the case "and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved."

The court in its opinion, after a running commentary, concluded: "We find the Act unconstitutional." The court then went on to say that there was no proof before it that the Commission had procured agreements, as required by the act, from shippers or handlers not subject to the provisions of the act, and that, while this fact might not render the act violative of the Constitution, it required an injunction to restrain the Commission from enforcing the prices fixed. An injunction was issued to remain in force until final hearing.

We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitu-

tional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.

The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure.[2]

The appellants complain that the court's opinion decides a question which was not open on the hearing and prejudices their position on final hearing; that the decision goes beyond the question of a prima facie showing made for the purpose of obtaining a temporary injunction and proceeds upon assumptions of fact not sustained by the evidence which appellants could have negatived by proof adduced at final hearing. The appellees insist that in holding the act unconstitutional the court did so only for the purposes of temporary relief and that its conclusion in this respect can have no effect upon the ultimate decision of the cause upon the merits. Nevertheless, the parties have essayed, in view of the action of the court below, to argue in this court the question of the constitutionality of the statute, whereas, if the court below had confined itself to the issue presented, namely, whether the proofs warranted the entry of an injunction pending a decision of the constitutional and other questions presented, the parties could either have obtained a trial on the merits long before an appeal from the interlocutory order could be heard in this case or, if an appeal from the interlocutory order had been perfected here, would have been restricted in argument to the question whether, upon proper findings and conclusions, the court had abused its discretion in granting or refusing an injunction.[3]

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[2] Compare Home Tel. & Tel. Co. *v.* Kuykendall, 265 U. S. 206; Railroad Commission *v.* Maxcy, 281 U. S. 82; Public Service Commission *v.* Wisconsin Tel. Co., 289 U. S. 67; Interstate Circuit *v.* United States, 304 U. S. 55; Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194; Polk Co. *v.* Glover, 305 U. S. 5.

[3] United States *v.* Corrick, 298 U. S. 435, 437.

Moreover, if appellants conceived themselves aggrieved by the action of the court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal.

The appellants insist that the bill fails to state facts sufficient to raise a substantial question as to the constitutional validity of the statute. They could have made this point in the District Court by a motion to dismiss and obtained a prompt decision on it. They omitted so to do.

The record does not warrant a judgment of dismissal. The complaint raises constitutional questions of due process, equal protection, and violation of the obligation of contract. It further raises questions as to whether the act has ever been put into operation in accordance with its terms.

The appellees' principal attack upon the statute, based upon the Constitution, centers on its regulation of prices. The mere fact that the act fixes prices is, in itself, insufficient to invalidate it;[4] and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction, except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal.

Some of the complainants are corporations of states other than Florida and allegations of the bill, which were not denied, sufficiently allege an amount in controversy in excess of $3,000 with respect to each complainant. In respect of the Commission's alleged failure to comply with the statute, it may be that these complainants are entitled to maintain the suit although not entitled to a hearing before a three judge court, even though it be found that there is no substance in the constitutional questions presented.

The legislation requiring the convening of a court of three judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury. Congress intended that, in this class of

[4] Nebbia v. New York, 291 U. S. 502; United States v. Rock Royal Cooperative, 307 U. S. 533, 569. Compare Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346.

suits, prompt hearing and decision shall be afforded the parties so that the states shall be put to the least possible inconvenience in the administration of their laws.

Both the court below and the appellants are in part responsible for the inexcusable delay in the disposition of this case. We are advised that since the entry of the injunction the defendants have answered the bill, and there appears to be no reason why the case cannot promptly be finally heard and decided upon the merits. We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing, and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52(a) of the Rules of Civil Procedure.

So ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 270.—October Term, 1939.

Nathan Mayo, as Commissioner of Agriculture of the State of Florida, et al., Appellants,
vs.
Lakeland Highlands Canning Co., Inc., the Polk Company and Roberts Bros., Inc., et al.

Appeal from the District Court of the United States for the Southern District of Florida.

[February 26, 1940.]

Opinion of Mr. Justice Frankfurter.

A different disposition of the case seems to me to be required.

Citrus fruit occupies a central and indeed pervasive rôle in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. The appropriateness of regulations to be adopted for the citrus fruit industry is thus peculiarly a matter for the legislature of Florida in whose keeping is the shaping of that state's social and economic policy. In *Nebbia* v. *New York*, 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. *Cf. West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. The allowable exercise of legislative discretion to attain price stability finds obvious occasion in the case of a commodity as basic to a state's economy as citrus fruit is to that of Florida. Certainly neither in the bill nor in the Court's opinion is a reason vouchsafed to take the present suit out of the scope of the *Nebbia* doctrine. The wisdom of such a policy—its efficacy to achieve the desired ends—is of course not our concern.

The price level here challenged was not hastily or crudely fixed. It was the result of an approved modern method for dealing with the complexities of such a problem. The price was not fixed directly by statute. It was ascertained under appropriate safeguards by a body established to carry into apt result the legislative policy for assuring "the grower returns at least equal to the cost of production. . . ." Laws of Florida, 1935, c. 16862. The Florida Citrus Commission on January 16, 1939, fixed minimum prices for

grapefruit, thereby establishing what is colloquially known as a "floor" for the market, so as to prevent the destructive play of blind economic forces.

This action was thereupon commenced in the District Court for the Southern District of Florida, not by any of the growers but by some canners, appellees here. On March 23, 1939, they sought to enjoin the Commissioner of Agriculture and other state officials from enforcing the fixed minimum prices. They claimed that these deprived them of the opportunity to buy in a cheaper market—the cheapness of competition indifferent to any but immediate consequences. They claimed irreparable damage and asked for both a temporary and a permanent injunction. On April 28, 1939, in the circumstances set forth in this Court's opinion, the District Court declared the statute unconstitutional and granted an interlocutory injunction. There were no findings—and there could have been none on this record—taking the statute out of the doctrine announced in the *Nebbia* case.[1] Certainly a consumer has no constitutional right to buy as cheaply as an unregulated industry would, under adverse circumstances, be compelled to sell.

Pursuant to the delays inevitable in a litigation like the present, an order allowing appeal was not granted until July 3, and the case was filed here on August 7, where in due course it was reached for argument on January 12, 1940. As a result, the injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.

I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous. We ought to apply what was characterized in *Mass. State Grange* v. *Benton*, 272 U. S. 525, 527, as "the important rule, which we desire to emphasize, that no injunction ought to issue against of-

[1] Appellees also attacked the Florida statute because of its provisions exempting co-operative and grower-owned canneries. This attack, however, must fail under our decision in United States v. Rock Royal Co-op., 307 U. S. 533. Appellees' contention that the statute is an unconstitutional burden on interstate commerce is likewise without substance. Sligh v. Kirkwood, 237 U. S. 52; Milk Board v. Eisenberg Co., 306 U. S. 346. Nor is there substantial basis for appellees' contention that the order unconstitutionally impairs the obligation of any contracts they may have previously made for the purchase of grapefruit at a price lower than that fixed under the statute. See, *e.g.* Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372. Cf. Knox v. Lee, 12 Wall. 457, 550-51.

ficers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Even if the present bill is taken at face value, it does not make out "a case reasonably free from doubt." The withdrawal of the ~~injunction pro-~~ ~~cess in~~ industrial controversies made by the Norris-LaGuardia Act was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy. Congress has also given indication in § 266 of the Judicial Code (28 U. S. C. § 380) of its concern over the misuse of the injunction, fashioned for settling an ordinary clash of private interests, to restrain the machinery of a state in carrying out some vital state policy.

The supervisory power of this Court over the district courts becomes especially appropriate in equity suits. We ought to feel free to apply the traditional powers of the chancellor on appeal to act as though the suit were before him *de novo*. Compare *United States* v. *Rio Grande Irrigation*, 184 U. S. 416, 423. The present case demands that we enforce the "important rule" of *Mass. State Grange* v. *Benton*, *supra*.

Inasmuch as the Florida statute is obviously constitutional, the bill does not raise a substantial federal question and the District Court was without jurisdiction to entertain it on behalf of the appellees who are citizens of Florida. As to them, the case should be remanded to the District Court with directions to dismiss the bill.

Some of the appellees, however, are citizens of other states, and among the allegations of the bill, in addition to the amount of damage requisite to give diversity jurisdiction, are those of failure by the state officials to comply with some of the conditions which appellees assert to be indispensable for the issuance of a valid price-fixing order under the statute. ~~We express no opinion on~~ the merits of these contentions. In any event they do not touch the constitutionality of the statute or the order, and so § 266 of the Judicial Code cannot be invoked for their adjudication. As to these appellees, the judgment below should be vacated and the case remanded to the District Court for any proceedings that may be appropriate before a single judge. But compare *Gilchrist* v. *Interborough Co.*, 279 U. S. 159.

Mr. Justice BLACK and Mr. Justice DOUGLAS join in these views.